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99TH CONGRESS *1st Session*	SENATE	REPORT 99-165

VOLUNTARY SILENT PRAYER CONSTITUTIONAL AMENDMENT

REPORT

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ON

S.J. Res. 2

together with

ADDITIONAL AND MINORITY VIEWS

OCTOBER 29 (legislative day, OCTOBER 28), 1985.—Ordered to be printed

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VOLUNTARY SILENT PRAYER CONSTITUTIONAL AMENDMENT

OCTOBER 29 (legislative day, OCTOBER 28), 1985.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S.J. Res. 2]

The Committee on the Judiciary, in which S.J. Res. 2 proposing an amendment to the Constitution relating to voluntary silent prayer was introduced, having considered the same, reports such resolution with recommendation.

The text of S.J. Res. 2 is as follows:

I. TEXT OF S.J. RES. 2

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress:

"ARTICLE ——

"Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any State

> shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of silent prayer or reflection."

II. SUMMARY

In its 1985 decision in *Jaffree* v. *Wallace*,[1] the United States Supreme Court held that the "establishment clause" of the first amendment was violated by a State law providing for "a period of silence . . . for meditation or voluntary prayer." This decision marked the culmination of more than two decades of Court decisions relating to the validity of various forms of reverential expression in public school classrooms under the U.S. Constitution.[2]

The purpose of Senate Joint Resolution 2 is to restore, in the limited area of silent public school prayer, what the Committee views to be the original understanding of the "establishment clause." The proposed constitutional amendment would allow for a brief period of silent prayer or reflection by public school students. Such prayer or reflection would be administered at the discretion of State or local officials; it would be conducted in silence; and it would allow for entirely voluntary participation by the student. Because of its silent character, there would be no need on the part of the State to have to distinguish between religions and denominations by composing or selecting any particular prayer. At the same time, potential embarrassment to the minority-religion student would be limited since there would be no need for such a student to have to conspicuously absent himself from the classroom (although reasonable accommodations would have to be made if that were the student's desire). The minority-religion student, as with all other students, would be able to pray in privacy according to those values most important to himself or herself. Such a prayer could be as robust and as intense as the student desired, with each student being provided an identical opportunity.

In the view of proponents of Senate Joint Resolution 2, the present amendment is necessary to restore the historic meaning of the first amendment, sharply altered by the Court's decision in *Jaffree*. The laws of at least 23 States were apparently overturned by the Court's decision in this case.[3] Historically, the "establishment clause" had been understood primarily to prohibit the State from establishing any official church or from preferring any particular church or denomination as a matter of general policy. As Justice Story observed in his "Commentaries on the Constitution":

> The real object of the First Amendment was . . . to prevent any national ecclesiastical establishment which would give to a hierarchy the exclusive patronage of the national government." [4]

Similarly, Prof. Edward Corwin, the distinguished constitutional scholar, has written:

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[1] 105 S. Ct. 2479 (1985).

[2] See especially *Engel* v. *Vitale*, 370 U.S. 421 (1962) and *Abington* v. *Schempp*, 374 U.S. 203 (1963).

[3] See generally Attachment B, infra.

[4] Story, III "Commentaries on the Constitution," § 1871.

> The historical record shows beyond peradventure that the core idea of an "establishment of religion" comprises the idea of preference; and that any act of public authority favorable to religion in general cannot, without manifest falsification of history, be brought under the ban of that phrase.[5]

During most of the Nation's history, this view of the first amendment influenced the development of public policy. While the Constitution took scrupulous pains to avoid the establishment of a theological republic, and even greater pains to ensure freedom of worship for all persons, it did not, according to this understanding, attempt to create an absolute and unbridgeable division between the State and all things of a spiritual character. Indeed, there was a profound awareness of the religious roots of the Nation and a desire to ensure that the religious impulse remain a part of the Nation's constitutional and political fabric. As Tocqueville observed, religion was "the first of [America's] political institutions." [6]

Proponents of S.J. Res. 2, whatever their perspective on alternative constitutional amendments (and they are of a mixed mind), believed that the proposed measure establishes an appropriate balance in public policy relating to school prayer. At the same time that the amendment restores to the "establishment clause" its lost original understanding in the area of prayer, and recognizes the value of prayer to the overall development of the young American citizen, S.J. Res. 2 also takes careful cognizance of traditional American precepts of religious tolerance and secular public institutions. It would establish a policy consistent with each of the principal strains in the religion clauses of the Constitution—an appreciation of the fundamental contribution of religion in the development of the American character, with the equally important recognition of the need to maintain respect for widely diverse and disparate religious views.

III. Original Constitutional Intent

The Constitution approved by the Philadelphia convention in 1787 contains a single clause concerning religious freedom. Article VI forbids religious tests for public office. When the state ratification debates suggested that a bill of rights would be necessary to preserve national confidence in the new Constitution, James Madison reduced the States' recommendations down to several proposed amendments for consideration by the new Congress.[7] His initial draft acknowledged their call for specific constitutional protection for religious liberty with the following language:

> The Civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established.[8]

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[5] Corwin, "The Supreme Court as National School Board," as reprinted in "A Constitution of Powers in a Secular State" (Charlottesville, Va. 1951) at 116.

[6] De Tocqueville, vol. 1 "Democracy in America," at 269 (Harper & Row, 1966).

[7] 1 Annals of Congress 434 (June 8, 1789).

[8] Id.

Madison's intent was clear: Congress could not establish any single national religion.

This language underwent numerous revisions in the legislative crucible of the First Congress, but Madison's original objective remained fundamentally uncompromised. The amendment was finally crafted to prohibit "establishment" of a national religion while permitting non-discriminatory government support generally for religion. This presupposed, within the framework of the Constitution's division of powers, that the States, in the absence of any specific Federal authority, retained the authority to dictate appropriate policies regarding government and religion.

Madison himself confirmed his intention in drafting the clause when he was asked on the House floor what he considered to be the meaning of the language ultimately incorporated in the new Constitution. His response was clear:

> Mr. Madison said he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law.[9]

In explaining the intent of the "establishment clause," he supplied a clarifying statement. Twice in this same speech, Madison noted that the amendment forbade Congress from establishing "a" religion. This properly focused the scope of the intent of the First Congress. By use of this clarifying "a," the original author of the amendment drew a distinction between congressional action that established a particular national religion and congressional support for religion in general.

Based on the historical context and content of the debates over the "establishment clause" in the First Congress, the evolving text of the first amendment, and the nearly one hundred and fifty years of consistent national policy following ratification of the first amendment, the establishment clause seems to have had three principal purposes: First, it prevented Congress from establishing a national church or religion. Second, it prevented Congress from according any single religion or denomination a preferred legal status. This second purpose was a logical corollary of the first: any congressional policy that elevated one religion or denomination over others would be taking the first legal step toward creation of national religion. Third, the States were permitted to define permissible relationships between religion and government. This third purpose is also, in a sense, a corollary of the first. Under the original constitutional framework, as clarified by the express language of the tenth amendment, drafted and ratified concurrently with the first amendment, any governmental authority not specifically delegated to Congress was reserved to the States.

The view of the establishment clause is supported by leading scholars. Professor Robert L. Cord, the author of the definitive work "Separation of Church and State",[10] testified that the "establishment clause":

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[9] Id. at 730.

[10] Lambeth Press, New York, 1982. On the original intent of the drafters of the first amendment as summarized in this section, see also generally Antieu, Downey, and Roberts, "Freedom from Federal Establishment: Formation and History of the First Amendment Religion Clauses"

Continued

> [W]as intended to prevent the establishment of a national church or religion, or the placing of any one religious sect, denomination, or tradition into a preferred legal status which characterized religious establishments * * * it was so constructed in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit.[11]

As noted earlier, Story stated in his landmark "Commentaries on the Constitution" that "the real object of the amendment was * * * to prevent any national ecclesiastical establishment which would give to an hierarchy the exclusive patronage of the national government."[12] Justice Story also noted that "whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice, and the State constitutions."[13]

CONTEXT

The first historical source for the finding that the "establishment clause" has the three described purposes is the context in which the First Congress drafted the first amendment. Events stretching back centuries prior to 1789 led inexorably toward the inclusion of a constitutional provision proscribing any national establishment of religion. To escape such establishments in the Old World, many colonists had risked the dangerous voyage across the Atlantic in search of a land that promised freedom to worship according to the dictates of conscience. The hardships endured by the Plymouth colony, William Penn and his followers, Roger Williams and the other settlers of Rhode Island, just to name a few, can only be properly understood with an insight into their quest for religious liberty in a land free of a national church.[14]

The religious conviction of many of these early settlers was manifest in the structure of their new governments as well. One observer has chronicled this early relationship between government and religion in the following manner:

> At the outbreak of the Revolution, there were varying forms of established churches in nine of the colonies. In the Southern colonies Maryland, Virginia, North Carolina, South Carolina and Georgia, the established religion was Anglicanism. In New England, Congregationalism was, in effect, the established church in three colonies—Massachusetts, New Hampshire, and Connecticut. New York had a unique arrangement allowing for the establishment of the Protestant religion.[15]

(Milwaukee, Bruce, 1964); Rice. "The Supreme Court and Public Prayer" (New York, Fordham, 1964); Ferrarra, "Religion and the Constitution" (Washington, Free Congress Research, 1983); as well as the works of Malbin, Berns, and McClellan cited at notes 17, 21, and 15 respectively.

[11] Hearing on S.J. Res. 73, Subcommittee on the Constitution, Senate Judiciary Committee, 98th Congress, 1st session, April 29, 1983.

[12] Joseph Story, III, "Commentaries on the Constitution," § 1871 (1983)

[13] Id. at § 1873.

[14] Edwin Scott Gausted, "A Religious History of America" (New York, N.Y.) at 392-393. See also generally the article by Eastland, In Defense of Religious America, Commentary, June, 1981, at 39.

[15] McClellan, "The Making and Unmaking of the Establishment Clause," Rader, "A Blueprint for Judicial Reform" (Washington, D.C., 1981) at 300.

Even in these colonies, however, later to be States, such established religions did not enjoy the exclusive authority of the Old World's State churches. Although certain denominations sometimes benefited from a preferred status, others were free to worship as they pleased. The colonial and early State governments, in other words, generally granted a freedom of worship to all citizens, while conferring upon their own religion—which they had fled England to practice—a superior status. Professor McClellan elaborates further:

> In four states, Massachusetts, Connecticut, Vermont, and New Hampshire, the Congregationalist Church occupied a position of quasi-establishment as a result of direct or indirect benefits conferred by the state constitutions and statutes. Ten states extended preferential treatment to the Protestant religion, and two states, Delaware and Maryland, favored simply the Christian religion.[16]

The existence of such constitutional and statutory provisions had a direct influence on the First Congress. Professor Michael J. Malbin, in his important analysis "Religion and Politics: The Intentions of the Authors of the First Amendments",[17] took this context into consideration in reaching his conclusion:

> The records available to us demonstrate that the establishment clause was meant to have two major purposes:
> (1) It prohibited the federal government from giving any aid to religion if the aid in question could tend to establish a religion. * * *
> (2) At the same time, the clause prohibited Congress from tampering with the state religious establishments.[18]

The First Congress did not wish to risk a confrontation with the State governments, but instead wished to pacify them, many of which had ratified the fledgling Constitution only after petitioning for amendments to guarantee Congress would never infringe basic rights secured by the various States. The 1787 Convention had not thought specific protection of such rights necessary because the strict limits of the new Constitution had given the Federal Government no authority at all pertaining to religion. Moreover, as Madison argued in the "Federalist Papers," an "extended" republic, comprised of persons with diverse religious preferences, would utilmately be likely to elect a representative mix of lawmakers who would never allow the central Government to impose a single religious orthodoxy upon the entire Nation.[19] This argument, however, did not convince many of the State ratifying conventions that the Federal Government might not still find a way to infringe basic rights regarding religion. Therefore a number of them petitioned Congress to propose an amendment to the Constitution. For example, Virginia and North Carolina stated:

> That religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed only by

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[16] Id. at 306.
[17] Michael J. Malbin, "Religion and Politics: The Intentions of the Authors of the First Amendment" (American Enterprise Institute, Washington, D.C., 1978).
[18] Id. at 23.
[19] Hearings, May 1, 1983.

> reason and conviction, not by force and violence; and therefore all men have an equal, natural and inalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.[20]

The Maryland, New York, and Rhode Island ratifying conventions proposed similar provisions. Before long, Madison, who had opposed a "bill of rights," promised to draft an initial such proposal in an effort to quell the increasing tide of antifederalism. The impetus for the Bill of Rights was to protect rights contained in the State constitutions and quarantee that Congress would not attempt to deprive States of the prerogative to define relations between religion and Government.

Relying heavily upon the writings of Washington, Jefferson, and other contemporaries of the drafting of the Constitution and the Bill of Rights, Dr. Berns, in "The First Amendment and the Future of American Democracy," describes the consensus in the late eighteenth century that support of religion in general was vital to the preservation of liberty. This consensus gave rise to the "establishment clause".

> Thus, natural rights are opposed by [human] passions, liberty by economic interest; and liberty can win in this contest only if it gains the support of religious conviction—specifically, the conviction in the minds of the people that liberty is the gift of God. Wisdom might dictate that it be the policy of the government to promote this conviction, which it can do by supporting religion in the form of a "multiplicity of sects" while favoring no particular one of them. Pennsylvania and New York, Jefferson had pointed out in the previous query, had shown the way for Virginia (and the United States as a whole). They had "long subsisted without any establishments," but religion was well supported there—"of various kinds indeed, but all good enough" from his political point of view, "all sufficient to preserve place and order [and] morals." Harvey C. Mansfield, Jr. has stated the conclusion to be drawn from this: "For the sake of liberty, government must support religion in general, but no particular religion." That this was Washington's opinion we know from the Farewell Address, and it explains the style of his First Inaugural. Government cannot afford to be neutral "between believers and nonbelievers"; good government depends on the existence of a certain kind of believer because there is, or was thought to be, a connection between religious belief and the moral character required to restrain the passions inimical to liberty. If religion "does not impart a taste for freedom," Tocqueville was to observe a few years later, "it facilitates the use of it." As we might expect from a man whose thought was strongly influenced by a tradition de-

[20] Elliot, ed., "The Debates in the Several States Conventions," 2nd ed. (Washington, D.C. 1836) at 659.

> rived from Rousseau, Tocqueville's opinion was that liberty cannot govern "without faith [and] is more needed in democratic republics than in any others."
>
> But the Constitution was ordained and established to secure liberty and its blessings, not to promote faith in God. Officially, religion was subordinate to liberty and was to be fostered—by public assistance, for example, and by exemplary admonitions on state occasions—only with a view to securing liberty.[21]

The flight of many early American colonists from countries with established religions, the special status accorded religion by the new State governments, the petitions by the State ratifying conventions in request of a constitutional amendment regarding religion, and the historical climate of respect for the role of religion in fostering freedom each inform the judgment that the words of the "establishment clause" were meant to preclude Congress from granting any religion or sect a preferred legal status. The States, on the other hand, were free to relate to religious institutions as they deemed proper. The First Congress was concerned about limiting the Federal Government in order to placate the antifederalists, not to circumscribe the authority of the States.

FIRST CONGRESS

James Madison's initial draft of what would later become the first amendment stated: "nor shall any national religion be established." His subsequent clause applied to the States: "No State shall violate the equal rights of conscience or the freedom of the press, or the trial by jury in criminal cases." [22] This latter clause, binding the States, was never approved by Congress, but suggests nevertheless that Madison, from the outset, intended the proposed "establishment clause" to encompass only the Federal Government.

Shortly after his initial draft was submitted to Congress, Madison was placed on a select committee to review amendment proposals and recommend a version to the House of Representatives. The Committee's eventual version of the "establishment clause" read, "No religion shall be established by law, nor shall the equal rights of conscience be infringed." [23] It was in his accompanying explanation of this language that Madison expressed his intent that the amendment precluded Congress only from establishing "a" religion.

Professor Malbin, in testimony before the Committee, summarized the debates that followed over Madison's language:

> Madison's interpretation did not match his original language. This led members of Congress to express two different kinds of concerns. One, to quote Benjamin Huntington, was "that the words might be taken in such latitude as to be extremely hurtful to the cause of religion." The other

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[21] Berns, "The First Amendment and the Future of American Democracy" 14-15 (New York, Basic Books, 1976).
[22] Supra n. 7.
[23] Supra n. 7 at 434.

> was that the amendment might permit Congress to pass laws that would threaten religious establishments in the States. Various formulas were offered to deal with these issues. Some would have limited the amendment to the establishment of articles of faith, but that did not satisfy members who were concerned about other, less drastic forms of discrimination.[24]

The first of these two major concerns over Madison's establishment clause was prompted by the concern of those, such as Congressman Huntington, that the provision could be interpreted to prohibit State laws supporting religions. Many States already had laws supporting ministers and places of worship. Although they expressed concern in terms of the relationship between the National and State Governments, their primary concern was that governmental aid to religion be maintained. Huntington, for example, wanted to avoid language that might "patronize those who professed no religion at all." [25] He did not want an amendment that required the Government to be neutral to differences between religion and irreligion, rather, he wished Government to be capable of favoring religion generally without preferring any particular sect.

Madison dealt with the concerns of Huntington, and others by recommending that the word "national" be inserted before "religion" in order to clarify that the amendment only prohibited Congress from establishing a national religion. Madison explained that such a change would narrow the amendment to its proper scope of preventing any "one sect [from] obtain[ing] a preeminence." [26] By so limiting his amendment, Madison, according to Dr. Malbin, was effectively assenting to Huntington's view that indirect nondiscriminatory aid to religion would be permissible.

Madison's recommendation, however, also raised the other issue alluded to by Malbin. Congressmen Livermore and Gerry objected to the term "national" because it implied that the Constitution had created a Nation with a strong central Government, instead of a union of States with a central Government of limited powers. They preferred to stress that the National Government possessed no authority with respect to religion. Accordingly, they proposed to say explicitly that "Congress shall make no laws touching religion." [27] In the interest of clarifying the strict limitation on Federal authority, the House temporarily adopted the Livermore-Gerry proposal.

A few days later, however, it adopted an alternative version of the amendment proposed by Congessman Ames of Massachusetts, "Congress shall make no law establishing religion." [28] Perhaps the principal conclusion to be drawn from the House debates was that the Federal Government, but not the States, was forbidden to "establish" a religion.

The lack of any complete record of Senate proceedings make it difficult to ascertain conclusively that body's intent. The Senate did, however, delete the the proposed amendment which restricted State actions regarding freedom of conscience, freedom of the press,

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[24] Hearings, April 29, 1983.
[25] 1 Annals 730–731.
[26] Id., at 731.
[27] Id.
[28] Id. at 766.

and trial by jury. Apparently the Senators were concerned with the meaning of the "establishing religion" language. For instance, the Senate adopted a modification altering the amendment to prohibit Congress from "establishing one religious sect or society in preference to others." [29] Even this narrower language was too broad for the Senate. Ultimately, it adopted language forbidding Congress from making laws "establishing articles of faith, a mode of worship, or prohibiting the free exercise of religion." [30]

The House refused to accept this Senate language and requested a conference. With Madison as one of the House conferees, this conference produced the present language of the first amendment.

The debates in the First Congress demonstrate a desire in both the House and the Senate to ensure that the "establishment clause" not limit State prerogatives with respect to religion. On the question of whether the clause would prohibit governmental aid to religion, Dr. Malbin concludes,

> In summarizing the history, I should like to emphasize the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish; but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect, and thus help avoid the religious divisiveness and warfare with which they were all so familiar from recent English history. We should not lose sight of the importance of this concern to the Framers.
>
> At the same time, however, most members of the First Congress also thought religion was useful, perhaps even necessary, for teaching morality. Most also thought a free republic needed citizens who had a moral education. They thus tended to view nondiscriminatory aid to religion not as a policy designed to achieve religious objectives, but as one, to use the current language "with a secular purpose and effect." [31]

The ten words of the "establishment clause" embodied a compromise on the issues raised by the First Congress debates. The first five words "Congress shall make no law" are clear. Both the Senate and the House wanted to prohibit the Federal Government from asserting any jurisdiction over matters left to the States by the framework of the Constitution, including church-state relations. This language made that intent explicit.

The next word in the establishment clause "respecting" was also an important aspect of the compromise contained in the final language of the first amendment. On the one hand, the conferees wanted to satisfy the concerns of Congressmen Livermore and Gerry in the House that the amendment not invest Congress with authority to legislate regarding State religious policies. On the other hand, the conferees also wanted to impart the understanding that Congress not pass laws that indirectly established a religion by according a single sect legal preference. The word "respecting"

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[29] "Journal of First Session of the Senate" at 70 (Aug. 25, 1789).
[30] Id. at 77 (Sept. 9, 1789).
[31] Hearings, April 29, 1983.

was designed to impart both meanings. It both prevented Congress from enacting laws affecting the State religious establishments and prohibited laws that "tend to" establish a preeminent status for a particular religion.

The final words of the clause were "an establishment of religion." The general term "establishment" did not narrow the prohibition to "articles of faith" or "modes of worship" as the Senate had proposed. In this sense, the amendment could encompass legal policies which discriminated between denominations and attempted to elevate one above another, without necessarily prescribing specific religious practices. On the other hand, the phrase *"an* establishment," as opposed to "the establishment," clarifies that the conferees were not forbidding all governmental interaction with religion *per se.* Malbin, again, provides insight on this choice of words:

> Had the Framers prohibited "the establishment of religion" which would have emphasized the generic word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences for religion over irreligion. But by choosing "an establishment" over "the establishment," they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect.[32]

This intent of the First Congress is even more evident in light of substantial evidence set forth later in this section that this Congress in fact gave legal support generally to religion.

The language chosen by the First Congress represented a careful compromise between the various viewpoints expressed during the debates. It represented an assurance that the jurisdiction of the States over religious establishments would not be usurped by the National Government, and it represented a prohibition against laws that established one religion in a position of preference over others. Perhaps most important to the First Congress, it represented a clear prohibition against any single national religion. At the same time, the language left latitude for governmental aid generally to religion.

CONSTITUTIONAL POLICY

This interpretation of the language of the "establishment clause" is strongly supported by the manner in which Presidents and Congresses interpreted the amendment for nearly a century and a half following its adoption. The First Congress itself clarified its intent with respect to its provisions by its enactment of the Northwest Ordinance of 1787. One provision in the Ordinance explained the reasons that the Congress chose to designate certain territorial lands for the construction of schools: "Religion, morality, and knowledge being necessary to good Government and the happiness of mankind, schools and the means of learning shall forever be encouraged."[33] At the time of this provision, many of the schools in the

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[32] Malbin, supra n. 17.
[33] 1 Stat. 50, 52 (1789), art. III.

territories were parochial. Its language suggests that the allocation of Federal lands for schools was intended to promote religious and moral purposes as well as narrower educational goals.

Professor Cord has accumulated an impressive array of historical evidence of a similar character, tending to explicate the understanding of the amendment of those closest in time to the actual drafting of the first amendment. Some of these were highlighted in his testimony in 1983 before the Committee:

> In 1971 [the *Lemon* case], Chief Justice Burger said for the Court that "[w]e have no long history of state aid to church-related educational institutions * * *" If the Court believes that, how would it explain the hundreds of thousands of federal tax dollars spent in support of Indian church schools until Congress altered the policy by statute in 1896? How would the Court explain the fact that during 1824–1831 alone, only seven years, the *Annual Reports of the Commissioner of Indian Affairs* indicate that U.S. tax dollars supported church schools run by the Society of the United Brethren, the American Board of Foreign Missions, the Baptist General Convention, the Hamilton Baptist Missionary Society, the Cumberland Missionary Board, the Synod of South Carolina and Georgia, the United Foreign Missionary Society, the Methodist Episcopal Church, the Western Missionary Society, the Catholic Bishop of New Orleans, the Society for Propagating the Gospel among the Indians, the Society of Jesuits, the Protestant Episcopal Church of New York, the Methodist Society, and the Presbyterian Society for Propagating the Gospel?
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> * * * * *
>
> Attributing to Jefferson and Madison an absolute separationist view, the Court frequently documents its interpretation of those gentlemen with reference to Jefferson's Virginia "Bill for Establishing Religious Freedom". Madison introduced this bill in 1785 as Jefferson's surrogate. And, it did become law in 1786 by act of the Virginia State Assembly. However, the Court neglects to tell us that on the same day, October 31, 1785, Madison also introduced a bill, again attributed to Jefferson, which severely fined "Sabbath Breakers". This too became law in 1786. Does this Jefferson action represent a high and impregnable "wall" view of separation of church and state?
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> In 1803, as President, Thomas Jefferson submitted to the United States Senate a proposed treaty with the Kaskaskia Indians, which included a clause pledging the United States to build a Roman Catholic church and provide a yearly stipend for its priest. Is this absolute separation of church and state? After the treaty was ratified, Jefferson asked Congress to act in its "legislative capacity" to meet the treaty obligations. I would like to ask the Supreme Court: When Congress appropriated the U.S. tax dollars to build that Roman Catholic church, did it pass a "law respecting an establishment of religion?"

Most recently the U.S. Senate and House chaplaincies have been assailed in federal court as unconstitutional. James Madison was one of six members of the committee of the First Congress which recommended the congressional chaplain system. Their recommendation was adopted, and an annual salary of $500 for public prayers in the Congress was provided by the very same Congress which proposed the Establishment Clause. Is this absolute separation of church and state? To advocates of absolute separation, obviously the First Congress did not know what the First Amendment—which they authored—meant.

Beginning in 1796 and culminating in 1804, the Congress of the United States passed laws, which in effect paid, with enormous land grants, in trust, an evangelical Christian sect to spread and maintain the gospel among Indians in the Ohio Territory. One of those laws was signed by George Washington, two by John Adams, and the last three by the third president of the United States. Yes, in 1802, 1803, and 1804, Thomas Jefferson, who refused to issue Thanksgiving Day proclamations because he thought they were unconstitutional, signed into law congressional enactments providing land for the "Society of the United Brethren for Propagating the Gospel among the Heathen". Is this a high and impregnable wall of separation between church and state? Apparently, Jefferson did not think those laws were unconstitutional, or else we are logically forced to believe that he was a rascal, sitting in the White House trying to destroy a principle which he fought so devotedly for—separation of church and state.

No, Jefferson, Madison, Washington, Adams, their Congresses, et al., were not rascals trying to destroy a principle that they themselves had enshrined in the Constitution. For them, the use of religious or sectarian institutions—including prayers—as means to reach secular ends was not a violation of the First Amendment unless, and only unless, preferential treatment was given one church, one religion, or one religious sect, thus elevating it into a preferred legal status.[34]

In addition, Professor Cord observes that the concept of "no religious preferential treatment" in the First Amendment's "establishment clause" can be evidenced in (1) Madison's Memorial and Remonstrance Against Religious Assessments in Virginia in 1785;[35] (2) Benjamin Franklin's call in the Constitutional Convention for Philadelphia clergymen to officiate at a daily prayer service;[36] (3) the various "church building" treaties negotiated and signed by Presidents Jefferson, Monroe, Quincy Adams, Jackson and Van Buren;[37] and (4) the granting of Federal funds to at least sixteen different Christian Mission schools.[38]

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[34] Hearings, April 29, 1983.
[35] Cord, "Separation of Church and State" (Lambeth Press, New York, 1982), at 20-29.
[36] "Debates in the Federal Convention of 1787 As Reported by James Madison," "Documents Illustrative of the Formation of the Union of the American States" (GPO, 1927), at 295-96.
[37] Cord, supra n. 35.
[38] "Annual Reports of the Commissioner of Indian Affairs," 1824-31, I (A.M.S. Press, 1976).

CONCLUSION

An examination of the historical records of the First Congress, and the roots of our national tradition of religious liberty suggest strongly the intended meaning of the "establishment clause." It was drafted primarily to foreclose the establishment of a national church or religious doctrine. Madison himself declared this intent on the House floor during deliberations on the meaning of the clause. The "establishment clause" also carries an implicit prohibition of congressional actions that could elevate any single religion into a position of preference over other religions. Such discriminatory actions would tend to establish a single religion as the preferred national church. Finally, the amendment was designed to protect the prerogatives of the State to establish or disestablish, support or refuse to support religious institutions.[39] Only this latter objective was ultimately to be altered through the judicial doctrine of fourteenth amendment "incorporation" of the Bill of Rights. Such "incorporation" does not alter the history of the development of the "establishment clause."

IV. The Evolving Law Since 1947

(A) Everson v. Board of Education

For the first one hundred fifty-seven years after its adoption, the "establishment of religion" clause of the first amendment was held to be applicable only to the Federal Government, not to the States. As the Supreme Court stated in *Permoli* v. *City of New Orleans:*

> The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the states. [44 U.S. (3 How.) 589, 609 (1845).]

Not until the case of *Everson* v. *Board of Education* [40] in 1947 did the Court hold the first amendment's nonestablishment of religious clause to be part of the "liberty" protected from undue State interference by the due process clause of the fourteenth amendment.[41] And when the Court did so, it imposed a particularly stringent—and historically controversial—interpretation of the "establishment clause."

The case concerned the constitutionality of a New Jersey township ordinance which reimbursed the parents of children attending both public and Catholic schools for the costs of bus transportation between home and school. Writing for the Court, Justice Black authored a selective—and now much-criticized [42]—history of the

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[39] A study by the Library of Congress Congressional Reference Service has identified numerous instances of public aid to private church-related schools in the early years of the Republic, Lyke, "Public Aid to Private Elementary and Secondary Schools," June 2, 1981. In Delaware, Virginia, and Pennsylvania, public financial support was provided to Sunday schools; in New York, assistance was accorded to church-operated charity schools; and in Connecticut, schools operated by Congregationalist ecclesiastical societies were provided with public funds.

[40] 330 U.S. 1 (1947).

[41] Seven years earlier the Court had held the free exercise of religion clause to be applicable to the States. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1947).

[42] For particularly trenchant criticism, see, Robert L. Cord, "Separation of Church and State: Historical Fact and Fiction" (1982).

original intent of the "establishment clause" and concluded with an interpretation of that clause that has set the tenor of Supreme Court decisions in this area ever since:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." [330 U.S. at 15–16.]

Despite this interpretation, the Court upheld the bus transportation subsidy as constitutional. But its adoption of the view that the establishment clause erected a "high and impregnable" wall of separation between church and state set the stage for the school prayer decisions that followed.

(B) Engel v. Vitale

In 1951, the New York State Board of Regents composed and recommended as part of its "Statement on Moral and Spiritual Training in the Schools" that local schools administer the following prayer on a daily basis:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.

When this recommendation was implemented by the New Hyde Park school district, a number of parents challenged the exercise as constituting an establishment of religion. But in *Engel* v. *Vitale,* three New York courts upheld the practice as constitutional, requiring only that student and teacher participation in the exercise be voluntary and noncompulsory.[43]

In 1962 the Supreme Court reversed.[44] Justice Black, again writing for the Court, termed the Regents' act of composing and endorsing a prayer "relatively insignificant" but nonetheless held that act to be unconstitutional. On the basis of an expanded version of the history of the first amendment which he had authored in *Everson,* Justice Black concluded:

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[43] *Engel* v. *Vitale,* 18 Misc. 2d 659, 191 N.Y.S. 2d 453 (Sup. Ct. 1959), aff'd 11 App. Div. 2d 340, 206 N.Y.S 2d 183 (App. Div. 1960), aff'd 10 N.Y.S. 2d 174, 176 N.E. 2d 579 (N.Y. 1961).

[44] *Engel* v. *Vitale,* 370 U.S. 421 (1962).

> Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity. [370 U.S. at 430.]

The history of governmentally established religion in England and in the American colonies, he said, showed both that such unions tended "to destroy government and to degrade religion" and that persecution of religious dissenters inevitably followed. Because of this history, he said, the first amendment was added to the Constitution "to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say. * * *" [45] Even though the Regents' prayer might be "denominationally neutral" and its observance on the part of students "voluntary," he said, "the New York laws officially prescribing the Regents' prayer are inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself." [46]

Justice Stewart dissented. The issue, he said, was not the establishment of a state church but "whether school children who want to begin their d,ay by joining in prayer must be prohibited from doing so":

> With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation. [370 U.S. at 445 (Stewart, J., dissenting).]

Justice Stewart said the Regents' prayer no more established an official religion than did the national anthem, the use of "In God We Trust" on the Nation's coins, the inclusion of the phrase "under God" in the Pledge of Allegiance, the daily invocation used by the Court, the chaplains' prayers given before the House and Senate, or "countless" other examples. All, he said, simply "recognize and * * * follow the deeply entrenched and highly cherished spiritual traditions of our Nation. * * *" [47]

(C) Abington School District v. Schempp and Murray v. Curlett

The following year the Court made clear that its holding in *Engel* was not limited solely to prayers composed by Government but barred other devotional exercises in the public schools as well. In *Abington v. Schempp* a Federal district court had ruled unconstitutional a Pennsylvania statute which directed that "at least ten verses from the Holy Bible shall be read, without comment, at the

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[45] Id., 429.
[46] Id., at 433.
[47] Id., at 450 (Stewart, J., dissenting).

opening of each public school on each school day." [48] The court had also held unconstitutional the practice of following these readings with unison recitals of the Lord's Prayer. In *Murray* v. *Curlett,* in contrast, the Maryland Court of Appeals had upheld a Baltimore school board rule that prescribed daily exercises consisting of Bible reading and/or the Lord's Prayer.[49] In both instances students did not have to take part in the exercises.

In *Abington* and *Murray* [50] the Supreme Court held the States' involvement in these exercises to constitute an establishment of religion in violation of the first amendment, as made applicable to the States by the fourteenth. Justice Clark, writing for the Court, asserted that the establishment clause prohibits the "official support of the State or Federal Government (from being) placed behind the tenets of one or of all orthodoxies" and imposes a "wholesome neutrality" on Government with respect to religion.[51] Crystallizing the mandate of the "establishment clause" into a two-part test, he stated:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. [374 U.S. at 222.]

The Court held both aspects of this test to be violated by the Pennsylvania and Baltimore requirements. The State and city argued that the purposes of the exercises were secular in nature—promoting moral values, contradicting materialism, perpetuating existing institutions, and teaching literature. But the Court found the exercises to be essentially religious in nature and held both their intent and their primary effect to be the advancement of religion, in violation of the first amendment. Though terming the exercises "relatively minor encroachments on the first amendment," the Court said that Government must maintain "strict neutrality, neither aiding nor opposing religion." [52]

Again, Justice Stewart dissented. The central value protected by the first amendment, he said, is the "safeguarding of the individual's right to free exercise of his religion. * * *" [53] Thus, he stated, in the public school environment the duty imposed on Government is not to provide an atmosphere utterly devoid of religious influences; rather, it is to avoid imposing any pressure on a child to participate, or not to participate, in such exercises. It is not neutral, he argued, for the State to bar all religious exercises from the public schools, because

> * * * a compulsory state educational system so structures a child's life that if religious exercises are held to be an

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[48] 201 F. Supp. 815 (E.D. Pa. 1962).
[49] 228 Md. 239, 179 A.2d 698 (1962).
[50] 374 U.S. 203 (1963).
[51] Id., at 222.
[52] Id., at 225.
[53] Id., at 312 (Stewart, J., dissenting).

> impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. [374 U.S. at 313.]

True neutrality, he claimed, requires that the State permit such exercises for those who want them.

Justice Stewart agreed that the Pennsylvania and Baltimore provisions would likely be unconstitutional if they permitted only a single religious book or only a single denominational prayer to be used. But he said they did not have to be so construed. They could be construed "simply as authorizing religious exercises" according to each local school community's consensus, that is, as accommodating the wide variety of religious beliefs that exist in our society. So construed, he said, the constitutional question became one of whether any coercion in favor of particular religious beliefs was involved in the implementation of the exercises. Because no evidence has been adduced on that issue in either case, he said, both should be remanded for further hearings.

The aggregate effect of the Court's decisions in *Engel* and *Abington* was to overturn existing law in at least 41 of the States, as well as the District of Columbia. (See XII.)

(D) Jaffree v. Wallace

The two-part test to be used in construing the establishment clause, announced by the Supreme Court in *Abington*, has been expanded by the Court in later decisions. In *Lemon* v. *Kurtzman*,[54] the Court wrote:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970).

In *Jaffree* v. *Wallace*,[55] the Supreme Court applied the *Lemon* criteria in finding unconstitutional an Alabama statute which authorized teachers in public schools to provide "a period of silence . . . for meditation or voluntary prayer" at the beginning of each school day. Justice Stevens, writing for the Court, asserted, that for a statute to survive review under the first prong of the *Lemon* test, it must have a clearly secular purpose. The first amendment, Justice Stevens wrote, "requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.[56]

Citing legislative history of the Alabama statute and the history of related Alabama statutes, the Court held that the statute before it had no secular purpose, and was, therefore, unconstitutional.

Although neither the majority opinion in *Jaffree* nor the concurring opinions by Justices Powell and O'Connor in the case explicit-

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[54] 403 U.S. 602, 612-613 (1971).
[55] 105 S. Ct. 2479 (2479 (1985).
[56] *Id.*, at 2490.

ly held that all statutes which provide for a period of silence for meditation or voluntary prayer are unconstitutional, such a holding was implicit in their opinion. All three opinions assert that some pure moment-of-silence statutes may be constitutional, but none of them clearly suggests that a provision for prayer during such moment-of-silence would be constitutional.

Chief Justice Burger, in one of three dissenting opinions in *Jaffree*, expressed his understanding of the Court's decision as prohibiting moment-of-silence statutes which included prayer. In addressing the holding, the Chief Justice stated:

> To suggest that a moment-of-silence statute that includes the word "prayer" unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion. [105 S. CT. at 2505]

In another dissenting opinion, Justice white expressed a similar understanding when he wrote:

> As I read the filed opinions, a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer. But if a student asked whether he could pray during that moment, it is difficult to believe that the teacher could not answer in the affirmative. If that is the case, I would not invalidate a statute that at the outset provided the legislative answer to the question "May I pray?" This is so even if the Alabama statute is infirm, which I do not believe it is, because of its peculiar legislative history. [105 S. Ct. at 2508]

In his dissenting opinion in *Jaffree*, Justice Rehnquist challenged the accuracy of the constitutional history which the Supreme Court has asserted in establishment clause decisions since 1947. Justice Rehnquist said that it will come as a great shock to many thoughtful Americans today, as it would to the drafters of the Bill of Rights, that the Constitution prohibits the Alabama legislature from "endorsing" prayer.

(E) Subsequent State and lower Federal court decisions

Subsequent decisions concerning religious exercises in the public schools by State and lower Federal courts have applied *Engel* and *Abington* in a variety of circumstances. Some of the cases have involved circumstances similar to *Engel* and *Abington*,[57] but others have extended those decisions to dissimilar situations. Kindergarten children, for instance, have been held to be constitutionally proscribed from required recitation of the following poem before their morning snack:

> We thank you for the flowers so sweet;
> We thank you for the food we eat;
> We thank you for the birds that sing;
> We thank you for everything.[58]

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[57] See, e.g., *Alabama Civil Liberties Union* v. *Wallace*, 331 F. Supp. 966 (M.D. Ala. 1971), aff'd 456 F.2d 1069 (5th Cir. 1972); *Adams* v. *Engelking*, 232 F. Supp. 666 (D. Idaho 1964); *John* v. *Allen*, 231 F. Supp. 852 (D. Del. 1964).

[58] *DeSpain* v. *DeKalb County School District*, 384 F.2d 836 (7th Cir. 1967), cert. den. 390 U.S. 906 (1968).

A student council has been held to be barred by the "establishment clause" from opening optional student assemblies with a prayer by a student.[59] A school district has been held to be barred from having a student volunteer read the House or Senate chaplain's remarks from the "Congressional Record" at voluntary student assemblies held before the beginning of classes.[60] Most recently a school board has been held to be prohibited from permitting student volunteers or teachers to pray in front of other students, even when the students have had to have the express written permission of their parents and to make a personal verbal request to participate.[61] All of these decisions have claimed to be built on the legal scaffolding erected by the Supreme Court in *Everson, Engel,* and *Abington* requiring a strict separation of church and state. As one court has stated:

> The Supreme Court thus far has not limited the broad language with which (as in the *Schempp* case) it has held invalid substantially nondenominational and neutral religious observances on public school property. Until and unless such a limitation takes place (even if there is minimal State encouragement of only insubstantial school religious exercises), it would serve no useful purpose to attempt to draw any fine distinction between those observances which have hitherto been proscribed by the Supreme Court and the * * * practices now presented for our scrutiny. [*Commissioner of Education* v. *School Committee of Leyden,* 358 Mass. 776, 778, 267 N.E. 2d 226, 228, cert. den. 404, U.S. 849 (1971).]

Silent school prayer.—Increasingly, this interpretation of the first amendment as mandating a strict separation of church and state has been used by several courts to invalidate State provisions for a moment of reverent silence at the beginning of each school day. Even prior to *Wallace* v. *Jaffree,* most Federal and State courts showed no inclination to uphold "silent prayer" statutes as constitutional.

The United States Court of Appeals for the Eleventh Circuit overturned the Alabama statute later considered by the Court in *Wallace* v. *Jaffree* which prescribed "a period of silence * * * for meditation or voluntary prayer" at the beginning of each school day in all public schools. In *Wallace* v. *Jaffree*[62] the appellate court held that the statute had been adopted with an intent "to return prayer to the public schools," that the inclusion of prayer in the statute "obviously involves the state in religious activities," and that the statute had a primary effect of advancing religion.

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[59] *Collins* v. *Chandler Unified School District,* 644 F.2d 759 (9th Cir.), cert. den. 454 U.S. 863 (1981). See also *Goodwin* v. *Cross County School District,* 394 F. Supp. 417 (CE. D. Ark. 1973).

[60] *State Board of Education* v. *Board of Education of Netcong, New Jersey,* 108 N.J. Super. 586, 262 A.2d 21, aff'd 57 N.J. 172, 270 A.2d 412 (1970), cert. den. 401 U.S. 1013 (1971).

[61] *Karen B.* v. *Treen,* 653 F.2d 897 (5th Cir. 1981), aff'd mem. 455 U.S. 913 (1982).

[62] 705 F.2d 1526 (11th Cir. 1983). Appeal docketed, 52 U.S.L.W. 3441 (Nov. 14, 1983).

Similarly, in *Duffy* v. *Las Cruces Public Schools*[63] a Federal district court held unconstitutional a New Mexico statute prescribing a period of silence "for contemplation, meditation, or prayer" at the beginning of each school day. The court found the statute's "pre-eminent purpose" to be "to establish a devotional exercise in the classrooms of New Mexico public schools" and said that the inclusion of the terms "contemplation" and "meditation" was no more than "a transparent ruse meant to divert attention from the statute's true purpose." The court enjoined the school district not only from implementing the minute of silence as authorized by the State statute but also from conducting "any exercise of a kind or nature similar to the minute of silence" authorized by the State statute. In *Beck* v. *McElrath*[64] another Federal district court struck down as unconstitutional a Tennessee statute prescribing a period of silence at the beginning of each school day "for meditation or prayer or personal beliefs." The court found that the statute was not intended to be a "neutral measure" but was intended "to establish prayer as a daily fixture in the public schoolrooms of Tennessee," that its primary effect was to promote religious exercises, and that its administration entangled public officials in religious exercises. Most recently, in *May* v. *Cooperman*,[65] a new Jersey statute prescribing a daily moment of silence for "contemplation or introspection" was declared unconstitutional by a Federal district court. The court found that the statute infringed on first amendment guarantees of separation of church and state since the purpose of the measure was "religious not secular." According to the court, the New Jerseys statute threatened to "promote government entanglement with religion" and "to cross the forbidden line."

Only one Federal court has upheld the constitutionality of a period of silent prayer. In *Gaines* v. *Anderson*,[66] a three judge Federal district court upheld a Massachusetts statute providing for a period of silence "for meditation or prayer" at the beginning of each school day. It said that the inclusion of the phrase "or prayer" did no more than reflect a "legislative sensitivity to the first amendment's mandate to take a neutral position that neither encourages nor discourages prayer."[67]

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[63] 557 F. Supp. 1013 (D. N. Mex.) (Appeal Dismissed, No. CA 83-1358) appeal pending sub nom. *Wash* v. *Duffy*, No. 83-1414 (10th Cir., July 7, 1983). A petition by the State for a writ of prohibition against the permanent injunction entered by the district court was denied by the United States Court of Appeals for the Tenth Circuit. *State of New Mexico* v. *Burciaga*, cert. denied 52 U.S.L.W. 3386 (Nov. 4. 1983).

[64] 548 F.Supp. 1161 (M.D. Tenn. 1982).

[65] Civil No. 83-89 (D. N.J. Oct. 24, 1983).

[66] 421 F.Supp. 337 (D. Mass. 1976).

[67] Id., at 343. See also "Opinions of the Justices," 198 N.H. 97, 228 A.2d 161(1967) and "Opinion of the Justices," 113 N.H. 297, 307 A.2d 558 (1973); *Jaffree* v. *James*, 544 F. Supp. 727 (S.D. Ala. 1982) vacated on other grounds 545 F. Supp. 1104 (S.D. Ala.), reversed 705 F.2d 1526 (11th Cir. 1983). Two other cases have discussed statutes that included provisions relating to a moment of silence, but neither have actually considered the constitutionality of such statutes. *Karen* v. Treen, 653 F.2d 897 (5th Cir. 1981); *State Board of Education* v. *Board of Education*, 108 N.J. Super. 564, 262 A.2d 21 (Ch. Div. 1970). In both instances, these statutes were struck down on other grounds.

V. The Legislative Response

Following the Supreme Court decisions in *Engel* and *Abington*, Congress has attempted to deal with the issue of public school prayer in a variety of ways. Within three days of the Court's ruling in *Engel*, more than 50 proposed constitutional amendments had been introduced in Congress to override or otherwise limit that ruling. By the end of the 88th Congress in 1964, following the *Abington* decision, more than 150 such amendments had been introduced.[68] Every subsequent Congress, through the present one, has seen the continued introduction of multiple constitutional amendments on the issue of school prayer, as well as related non-constitutional initiatives.

The first major legislative action occurred in 1966 when Senator Everett Dirksen (R-Ill.) offered a constitutional amendment on school prayer as a substitute for a pending resolution relating to the designation of a National UNICEF Day. The operative part of the amendment read as follows:

> Nothing contained in this Constitution shall prohibit the authority administering any school, school system, educational institution, or other public building supported in whole or in part through the expenditure of public funds from providing for or permitting the voluntary participation by students or others in prayer. Nothing contained in this article shall authorize any such authority to prescribe the form or content of any prayer.

Following the rejection of an effort to transform the amendment into a simple "sense of the Senate" resolution, the proposed Dirksen amendment was supported by a vote of 49–37,[69] 12 votes short of the necessary two-thirds majority.

The next significant legislative initiative occurred 4 years later in 1970 when Senator Howard Baker (R-Tenn.) proposed, as an amendment to the pending Equal Rights Amendment, the following language:

> Nothing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, to participate in non-denominational prayer.

Although the Baker amendment was adopted by an overwhelming 50–20 vote,[70] this was widely interpreted at the time as a part of a strategic effort to slow down the progress of the ERA rather than as an expression of support for the substantive prayer proposal. Shortly after the adoption of the prayer amendment, the ERA was withdrawn from further legislative consideration.

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[68] See, generally, hearings before the Committee on the Judiciary of the House of Representatives on School Prayer, 88th Congress, 2d session, vol. I–III (1964). Subsequent congressional hearings on this matter can be found at hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary on School Prayer, 89th Congress, 2d session (1966); hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary on Prayer in Public Schools and Buildings, 96th Congress, 2d session (1980).

[69] See 112 Congressional Record S 23063–84; 231122–47; 23155–63; 23202–07; 23531–56 (1966).

[70] See 116 Congressional Record S36478–505 (1970).

The following Congress, the House of Representatives for the first time was presented with the opportunity to address the school prayer issue. In 1971, following a successful discharge petition effort led by Rep. Chalmers Wylie (R-Ohio), the House voted on a weakened version of the Baker amendment. Despite securing a 240–162 vote, the proposed amendment fell 28 votes short of the necessary two-thirds majority.[71]

Despite the regular reintroduction of proposed constitutional amendments relating to school prayer, nearly 8 years then elapsed before another congressional vote occurred on this issue. In early 1979, Senator Jesse Helms (R-N.C.) secured adoption of an amendment to a bill to create a new Department of Education that removed from all Federal courts, including the Supreme Court, jurisdiction over cases relating to "voluntary prayers in public schools and public buildings." [72] Several days after its adoption, however, the Senate deleted this language from the bill to which it had been added, and instead attached it to a far less significant measure relating to Supreme Court mandatory jurisdiction. While the Department of Education legislation eventually became public law, the Supreme Court jurisdiction bill eventually expired without further action in the House of Representatives.[73]

An amendment by Rep. Robert Walker (R-Penn.) to the House version of the Department of Education charter was adopted by a 255–122 vote several months after the parliamentary maneuverings in the Senate.[74] This amendment would have established as a major purpose of the new department,

> To permit in all public schools providing elementary or secondary education a daily opportunity for prayer or meditation, participation in which would be on a voluntary basis.

The Walker amendment was eventually deleted in House-Senate conference on this measure.

A subsequent amendment, also introduced by Representative Walker, did become law. In 1980, he successfully authored an amendment to the fiscal year 1981 appropriations bill for the Department of Education prohibiting funds contained in the measure from being used to "prevent the implementation of programs of voluntary prayer and meditation in the public schools." [75] Despite the fact that the Department had never threatened to use its funds in such a manner, the Walker amendment has been regularly readopted in appropriations bills relating to the Department of Education.[76]

The Helms amendment, proposing to remove jurisdiction from the Federal courts over issues of school prayer, became the subject of even more intense Senate controversy during the 97th Congress. In August of 1982, Senator Helms reoffered this amendment to a

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[71] See 117 Congressional Record H39886-958 (1971).
[72] See 125 Congressional Record S7577-81 (1979).
[73] See 125 Congressional Record S7631-44; 7649-57 (1979).
[74] See 125 Congressional Record H4322-29 (June 11, 1979) (daily ed.).
[75] See 126 Congressional Record H7972-73 (Aug. 27, 1980) (daily ed.) Public Law 96-536, sec. 108 (Jan. 3, 1981).
[76] See, e.g., Public Law 97-276, sec. 101(b) (Oct. 1, 1982); Public Law 97-377, sec. 101(e)(1) (Dec. 21, 1982).

debt-limit increase bill.[77] Immediately thereafter, Senators Lowell Weicker (R-Conn.), Max Baucus (D-Mont.), and Robert Packwood (R-Ore.) engaged periodically in a 5-week period of "extended debate" on the prayer proposal (as well as on a similar antiabortion amendment). On seven occasions, the Senate refused to invoke cloture and bring the debate to a close.[78] Finally, Senator Helms moved to recommit the debt ceiling measure to committee with instructions to report back a clean bill with his prayer amendment included, but this motion was tabled by a vote of 51-48.[79]

Despite nearly 20 years of legislative activity then on the issue of school prayer, the Senate and the House have each had but a single opportunity, until the debate in the Senate in the 98th Congress on President Reagan's proposed amendment, to vote directly on a school prayer amendment, unencumbered by peripheral issues of legislative procedure. The Senate has not had such an opportunity since 1966 and the House since 1971. Until the 98th Congress, no committee of either House of Congress had voted to report a constitutional amendment relating to prayer to the full legislative body.

VI. Legislative History of S.J. Res. 2

On May 17 1982, President Ronald Reagan became the first President of the United States since *Engel* and *Abington* decisions to recommend adoption of a constitutional amendment on the school prayer issue. The proposal from President Reagan reads as follows:

> Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.

The proposed amendment was introduced on May 18 by Senators Strom Thurmond (R-S.C.) and Orrin Hatch (R-Utah)[80] and on May 25 by Representatives Thomas Kindness (R-Ohio), Trent Lott (R-Miss.), and Robin Beard (R-Tenn.).[81]

During the 97th Congress, the Senate Committee on the Judiciary, chaired by Senator Thurmond, conducted three days of hearings on the proposed constitutional amendment.[82] On July 29, 1982, the Committee heard testimony from Senator Mark Hatfield (R-Oreg.); Senator Jesse Helms (R-N.C.); Rabbi Seymour Siegel, Jewish Theological Seminary; John M. Murphy, Knights of Columbus; Robert Dugan, National Association of Evangelicals; Ed McAteer, Religious Roundtable; Gary Jarmin, Project Prayer; Rev. Dean Kelley, National Council of Churches; Dr. Jimmy R. Allen,

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[77] See 128 Congressional Record S 10735-36 (Aug. 18, 1982) (daily ed.). See also hearings before the Subcommittee on the Constitution of the Senate Committee on the Judiciary on Constitutional Restraints Upon the Judiciary, 97th Congress, 1st Session (1981).

[78] See 128 Congressional Record S 11230-31 (Sept. 9, 1982); S11376 (Sept. 13, 1982); S11574 (Sept. 15, 1982); S11805 (Sept. 20, 1982); S11961 (Sept. 22, 1982); and S12022 (Sept. 23, 1982) (daily eds.).

[79] See 128 Congressional Record S 12022-23; 12037 (Sept. 23, 1982 (daily ed.). A similar motion was defeated even more decisively by a 62-36 vote during the 99th Congress. (131 Congressional Record S 11146-83 (Sept. 10, 1985) (daily ed.)).

[80] S.J. Res. 199 (97th Cong.). 128 Congressional Record S5428 (May 18, 1982) (daily ed.).

[81] H.J. Res. 493 (97th Cong.). 128 Congressional Record H2852 (May 25, 1982) (daily ed.).

[82] Hearings by the Senate Committee on the Judiciary on Proposed Constitutional Amendment to Permit Voluntary Prayer, 97th Congresses, 2d session (1982).

National Baptists Convention; Dr. Charles Bergstrom, Lutheran Counsel in the U.S.A.; Nathan Z. Dershowitz, American Jewish Congress; and Rep. Thomas Kindness (R-Ohio). On August 18, 1982, the Committee heard testimony from Rep. Stephen Neal (D-N.C.); Edward Schmults, Department of Justice; Pat Robertson, Christian Broadcast Network; Willard H. McGuire, National Education Association; Joanne Goldsmith, National Coalition for Public Education and Religious Liberty; James Corman, Americans United for the Separation of Church and State; George E. Bushell, United Presbyterian Church; John Buchanan, People for the American Way; and George Ogle, United Methodist Church. On September 16, 1982, the Committee heard testimony from Hermine Herta Meyer, attorney; Mary Elizabeth Bull, Maryland Interfaith Committee for School Prayer; James M. Smart, Jr., attorney; Grover Rees, University of Texas Law School; Terrance Sandalow, University of Michigan Law School; Geoffrey R. Stone, University of Chicago Law School; Norman Redlich, New York University Law School; Paul Bender, University of Pennsylvania Law School; and William Van Alstyne, Duke University School of Law.

No subsequent legislative action was taken on the amendment during the 97th Congress.

On March 24, 1983, Senators Thurmond and Hatch reintroduced the proposed constitutional amendment, by request, along with four additional cosponsors, Senators Lawton Chiles (D-Fla.), James Abdnor (R-S.D.), Don Nickles (R-Okla.), and Jesse Helms (R-N.C.).[83] In the House, Rep. Kindness reintroduced the measure with 25 cosponsors.[84] Two days of hearings were subsequently conducted by the Senate Judiciary Subcommittee on the Constitution, chaired by Senator Hatch. On April 29, 1983, the subcommittee heard testimony from Professor Robert Cord, Northeastern University; Edward Schmults, Department of Justice; William P. Thompson, United Presbyterian Church, U.S.A.; and Professor Walter Dellinger, Duke University School of Law. On May 2, 1983, the subcommittee heard testimony from Professor Michael Malbin, American Enterprise Institute; Bonnie Bailey, student, Lubbock High School; Robert Dugan, National Association of Evangelicals; Gary Jarmin, Christian Voice; Professor Burke Marshall, Yale University School of Law; James Dunn, Baptist Committee on Public Affairs; Richard Dingman, Moral Majority; Gail Merle, Bar Association of New York City; and the Honorable Terrel Bell, Department of Education.

On June 9, 1983, the Subcommittee on the Constitution met in executive session and reported S.J. Res. 73 without amendment to the full Committee on the Judiciary. In addition, the subcommittee voted to report a new proposed amendment introduced by Senators Thurmond, Hatch, and Grassley. The amendment, S.J. Res. 212, was limited to silent prayer or meditation.[85] A second section of

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[83] S.J. Res. 73 (98th Cong.). 129 Congressional Record S3917-8 (Mar. 24, 1983) (daily ed.).

[84] H.J. Res. 100 (98th Cong.). 129 Congressional Record H142 (Jan. 26, 1983) (daily ed.).

[85] At least one State (Illinois) has urged Congress to amend the Constitution to allow daily moments of silent prayer. Resolution adopted by the legislature of the State of Illinois to the Committee on the Judiciary, 125 Congressional Record 3655 (1979).

S.J. Res. 212 was concerned with equal access to public school facilities, an issue subsequently addressed by Congress in the 98th Congress in Public Law 98-377

On June 27, 1983, the full Committee on the Judiciary heard testimony on the proposed school prayer amendments from the following individuals and organizations: Edward Schmults, Department of Justice; Senator Mark Hatfield (R-Oreg.); Professor Robert Cord, Northeastern University; Professor Michael Malbin, American Enterprise Institute; Professor Walter Dellinger, Duke University School of Law; Professor Paul Bender, University of Pennsylvania School of Law; Baptist Joint Committee on Public Affairs; Lutheran Council U.S.A.; National Council of Churches; American Jewish Congress; Moral Majority; Freedom Council; Christian Voice; Center for Judicial Studies; American Civil Liberties Union; Americans United for the Separation of Church and State; People for the American Way; United Methodist Church; Episcopal Church; Union of American Hebrew Congregations; American Association of School Administrators; National Association of State Boards of Education; National Education Association; American Family Seminar; B'nai B'rith Women; Christian Legal Society; National Council of Jewish Women; Anti-Defamation League; American Jewish Committee; Seventh Day Adventists; and the Americans for Democratic Action.

In addition, the full Committee on the Judiciary conducted two days of hearings, April 28 and August 3, 1983, solely on the issue of "equal access," addressed by section 2 of S.J. Res. 212.

On July 14, 1983, the full Committee on the Judiciary considered both constitutional amendments reported to it by the Subcommittee on the Constitution. The Committee voted 14-3 to report both proposed constitutional amendments to the full Senate, without recommendation.

After 10 days of debate, the full Senate voted 56-44 in favor of S.J. Res. 73, 11 votes short of the two-thirds majority necessary for the passage of a consitutional amendment.[86] S.J. Res. 212, however, was not considered by the full Senate during the 98th Congress.

On January 3, 1985, at the outset of the 99th Congress, Senators Hatch and DeConcini (D-Arizona) introduced S.J. Res. 2, proposing an amendment to the Constitution relating to voluntary silent prayer or reflection.[87] This new amendment, similar to section 1 of S.J. Res. 212 from the previous Congress, read as follows:

> Nothing in this Constitution shall be construed to prohibit individuals or group silent prayer or reflection in public schools. Neither the United States nor any State shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of prayer or reflection.

On June 19, 1985, the Subcommittee on the Constitution heard testimony on S.J. Res. 2 from the following persons: Congressman Thomas N. Kindness (R-Ohio); Congressman Joe Barton (R-Texas); Dr. Michael Malbin, American Enterprise Institute; Dean Norman

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[86] See 130 Congressional Record S2879 (Mar. 20, 1984).
[87] See 131 Congressional Record S73 (Jan. 3, 1985).

Redlich, New York University College of Law; Thomas F. Parker IV, Parker & Kotauc; and Reverend Dean Kelly, director of religious and civil liberty, National Council of Churches of Christ in the U.S.A.

On June 26, 1985, the Subcommittee on the Constitution, in executive session, approved S.J. Res. 2 for full Committee consideration favorably with a technical amendment by a 4-1 vote. The resolution was amended by inserting the word "silent" before the words "prayer or refection" in the second clause of the second sentence.

On October 3, 1985, the full Committee on the Judiciary favorably reported S.J. Res. 2 by a 12-6 vote. Voting in favor were the following members: Mr. Thurmond, Mr. Laxalt, Mr. Hatch, Mr. Simpson, Mr. Grassley, Mr. East, Mr. Denton, Mr. McConnell, Mr. Biden, Mr. Byrd, Mr. DeConcini, and Mr. Heflin. Voting in opposition were the following members: Mr. Mathias, Mr. Specter, Mr. Kennedy, Mr. Metzenbaum, Mr. Leahy, and Mr. Simon.

VII. Purpose of S.J. Res. 2

> Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any State shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of silent prayer or reflection.

The purpose of S.J. Res. 2 is to remove any constitutional barrier to "individual or group silent prayer or reflection" by public school students at a time, place, and manner that may be established by State or local authorities. In particular, it is intended to reverse the effects of Jaffree v. Wallace as it relates to silent prayer in the public schools. To the extent that there is ambiguity or lack of clarity about the application of this decision in the area of silent prayer or reflection, S.J. Res. 2 is designed to clarify that they are not to establish any constitutional barriers to this form of devotional exercise.

S.J. Res. 2 is not intended to alter any existing understanding of the first amendment, or more particularly its religion clauses, except to the extent that this is necessary to restore discretion to State or local authorities to structure a religious exercise consistent with the terms of this amendment. It is not intended to alter the understanding of the "establishment" clause in any regard except to allow the opportunity under the appropriate circumstances for such an exercise. Nor is it intended to alter any existing understanding of the "free exercise" clause; S.J. Res. 2 would grant no "right" in any student to participate in any form of prayer, nor any other "right" in any person (except for the appropriate public authorities) to demand that prayer be allowed. Whether or not to structure a devotional exercise consistent with this amendment would be a decision in the sole discretion of those State and local authorities who are otherwise responsible for determining and administering public school policies. These authorities could choose to allow devotional opportunities to the fullest extent permitted by this amendment; they could choose to allow them to a more limited

extent (e.g., on a weekly basis rather than a daily basis); or they could choose to prohibit them entirely.

S.J. Res. 2, further, is not intended to preclude or prejudice any subsequent decisions by courts that may interpret the first amendment or any other provision of the Constitution in a manner offering more expansive opportunities for devotional exercises. S.J. Res. 2 would merely establish a minimum standard in this regard. Should such courts, for example, reconsider decisions such as *Engel* and *Abington* and reinterpret the "establishment clause" in a manner that allowed devotional exercises of the sort outlawed in these decisions, nothing in S.J. Res. 2 would prohibit this. S.J. Res. 2 would only preclude subsequent court decisions attempting to read the first amendment or any other provision of the Constitution in a manner outlawing "individual or group silent prayer or reflection" in public schools.

S.J. Res. 2 is limited in its application, as well, to public schools. It has no application to any other form of public institution. Specifically, it neither limits nor permits any devotional exercise that may take place in the context of legislative bodies, military units, penal institutions, and so forth.

In the context of S.J. Res. 2 the term "public schools" is meant to refer to the educational curriculum or regimen to which all students are normally subject. It is not meant to refer to the brick and mortar of the public school building within which this curriculum or regimen is normally experienced. Thus, if such a curriculum or regimen takes place in a nontraditional educational facility, the provisions of S.J. Res. 2 would continue to be applicable. The intent of S.J. Res. 2 is to focus, not upon the structure in which public education takes place, but upon the curriculum or regimen of education itself.

The corollary of this is that there will be issues of church-state relations that may relate to the public school building but that will remain outside the scope of S.J. Res. 2. These would be matters which did not directly relate to the public school educational curriculum or regimen itself. Among these would be such matters as the extent to which religious institutions could employ public school facilities during nonschool hours, the accommodation to be made by public schools in allowing students to attend private religious exercises or religious training, the propriety of religious inscriptions upon public school structures, nativity scenes in schools, the propriety of posting religious statements or documents, and so forth. Each of these issues would continue to be decided in a manner consistent with existing provisions of the Constitution. Issues relating to religion in the public schools, in such nonprayer contexts, as education in comparative religions, the teaching of evolution versus creationism, and so forth, would also be outside the scope of the provisions of S.J. Res. 2.

In addition, nothing in this amendment is designed to address the issue of religious activities which have been permitted in the public schools on the basis of being ceremonial or educational or patriotic. This would include public school Christmas assemblies, religious invocations at graduation, grace before meals, the profession of faith in a Supreme Being contained in the Pledge of Alle-

giance, and so forth. Such matters would continue to be addressed in their current first amendment context.[88]

While S.J. Res. 2 has a principal objective the maintenance of a neutral and limited role for the Government with respect to the described manner of silent prayer or reflection, it is intended that the Government be authorized to sponsor such prayer or reflection, to the extent of permitting the classroom teacher or other school administrator to structure the opportunity for prayer by formally announcing the period for silent prayer or reflection, ensuring discipline during the period for prayer, and formally concluding the period for prayer. Such a role is anticipated to be largely ministerial in nature, and is subject to the requirements of the second sentence of S.J. Res. 2 relating to the voluntariness of the student's participation and the neutrality of the Government as to the form of the prayer.

By the term "individual or group" silent prayer or reflection, it is meant only that State and local authorities should have reasonable discretion in administering the time, place, and manner of the prayer. The concept of "group" prayer is simply meant to signify the simultaneous opportunity for individual students to pray or reflect in the described manner. The use of the conjunctive "silent prayer or reflection" is meant to ensure that school authorities, should they choose to allow such devout moments of silence, make clear that either silent "prayer" or silent "reflection" is permissible. School authorities would not be permitted to authorize only silent "prayer".

While the proponents of S.J. Res. 2 recognize that there will be occasional questions as to what constitutes "silent" prayer or reflection, we believe that most such questions can be resolved by the proper State and local authorities. The purpose of S.J. Res. 2 is not to establish a code of conduct or a set of disciplinary rules for school districts throughout the country. We would see no difficulty, for example, with authorities permitting Jewish students to wear skullcaps during the moment of silence, or Catholic students to hold rosary beads, or other students to read from a written card supplied by their church. On the other hand, such incidental physical displays should not become instruments of pressure used by a majority to single out a minority within a classroom. The standard to be employed, generally, by local school authorities in determining the propriety of gestures, rituals, and ornaments should be whether they are being used in a public manner, or in a purely personal manner. If used in the latter way, they would be consistent with the amendment. Specific decisions on such incidental forms of conduct, however, should remain in the purview of State and local authorities consistent with the fundamental principles of S.J. Res. 2.

The Committee emphasizes again that teachers and other school officials are not, by their words or actions, to encourage either

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[88] See, e.g., *Florey* v. *Sioux Falls School District* 49-5, 619 F.2d 1311 (8th Cir.), cert, den., 449 U.S. 987 (1980); *Wood* v. *Mount Lebanon Township School District*, 342 F. Supp. 1293 (W.D. Pa. 1972); *Engel* v. *Vitale*, 370 U.S. 421, 435 n. 21 (1962); *Hall* v. *Bradshaw*, 630 F.2d 1018, 1023 n. 2 (4th Cir. 1980) cer. den., 450 U.S. 959 (1981). See also *Widmar* v. *Vincent*, 454 U.S. 263 (1981), in defense of the specific proposition that the "establishment clause" is not violated simply because a public institution is the site of religious speech.

prayer or reflection, or any particular form of prayer or reflection. For example, it would not be permissible for a teacher to write a prayer on a blackboard or to distribute language of a prayer. The operative idea here is that the teacher is limited to communicating to the students that the period has arrived for "silent prayer or reflection"; he or she may not encourage any particular form of activity falling within this definition.

The second sentence of S.J. Res. 2 essentially restates present law in its prohibition upon the Government requiring any person to participate in prayer or meditation. The intent of this sentence is to ensure that participation is entirely voluntary and that there shall be no forced participation directly or indirectly in the exercise of the silent prayer or reflection or the accompanying procedure. Not only would such compulsion be in violation of the Constitution, but the clear intent of S.J. Res. 2 is that public authorities undertake to make reasonable accommodation for those students who choose not to participate in any way in the devotional exercise authorized by this provision.[89] Such students should, if they choose, be allowed to leave the classroom or other premises in which the prayer is conducted, remain seated, or otherwise be facilitated in their nonparticipation. A reasonable effort should be made to minimize any inconvenience or embarassment caused the nonparticipating student, and to minimize the conspicuousness with which his nonparticipation is accommodated. No inquiries into the reason for such nonparticipation would be permitted.

The use of the term "United States" is meant to signify that the National Government should not, either in its capacity as direct authority for the public schools in certain jurisdictions (e.g. District of Colombia, Indian reservations, territories) or indirectly, through Federal grants-in-aid, require any person to participate in prayer in the context of S.J. Res. 2. The use of the term "State" connotes both the actual States of the Union as well as local units of government established under their authority. School officials and administrators, teachers, and other public employees (in their official capacities) would, of course, be encompassed, within the meaning of both the terms "United States" and "State."

While subtle as well as overt forms of coercion would be prohibited by the second sentence of S.J. Res. 2, the proponents of this amendment explicitly reject the theory of "implied coercion" [90] which suggests that the fact of group silent prayer by consenting students, in and of itself, has a coercive impact upon objecting students. The right of objecting students not to participate in silent prayer is fully protected by S.J. Res. 2, any "implied coercion" notion denying concomitant right to participate by consenting students is rejected.

The use of the term "such" prior to "prayer or reflection" in the final sentence of S.J. Res. 2 is meant only to clarify that the provisions of the second sentence apply to the specific prayer authorized

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[89] Cf. *West Virgina State Board of Education* v. *Barnette*, 319 U.S. 624 (1943) (relating to accommodations to be made to students who choose not to recite the Pledge of Allegiance). Many schools have adopted similar policies regarding the teaching of such sensitive subjects as sex education.

[90] *Engel* v. *Vitale*, 370 U.S. at 431; *Abington* v. *Shempp*, 374 U.S. at 288 (Brennan, J. concurring).

by sentence 1. These are dependent sentences and refer to the same religious exercise. The prohibition upon the encouragement of "any particular form of prayer or reflection" refers to the substantive content or religious statement involved in the silent prayer or reflection, and includes a prohibition against favoring prayer over reflection. It is implicit in the first sentence (1) that the Government can "encourage" silent prayer to the extent that it continues to enforce the (existing) constitutional prohibition against other forms of prayer; and (2) that it can "encourage" a disciplined, personal moment of silent prayer or reflection to the extent that it enforce either normal rules of school conduct or incidental rules relating to religious gestures, rituals, or ornaments.

In summary, the purpose of S.J. Res. 2 is to allow the Government to facilitate a reasonable expression of religious values by the public school student while ensuring that the rights of minority-religion and other students are fully respected. No religious sect or tradition would be placed in a preferred position under the first amendment.

VIII. Criticisms of Silent Prayer Amendment

Completely apart from the criticisms of S.J. Res. 2 from those who approve of the present constitutional status of school prayer, a number of criticisms have been offered about the proposed amendment by individuals who favor constitutional change relating to school prayer. The principal criticisms appear to be as follows:

A. STRENGTH OF RELIGIOUS DEVOTION

A silent prayer constitutional amendment has been criticized as affording less of an opportunity for expressions of strong religious devotion in the public schools than an amendment allowing vocal prayer. Whatever disagreement the proponents of S.J. Res. 2 might have about alternative constitutional amendment relating to prayer, we believe that the present amendment would afford the opportunity for strong and intense expressions of religious belief.

We reject the notion that simply because a prayer is vocal, rather than silent, that it is necessarily a stronger prayer. Indeed, there has been some concern expressed that once a State or locality has gone through the process of selecting a vocal prayer for recitation in the schools—a nondenominational, "official" public prayer designed to be tolerable to as broad a religious constituency as posible—any emerging vocal prayer will represent a "lowest common denominator" not likely to be fully satisfying to any individual religious group.

A possible alternative to such a "lowest common denominator" prayer would be some form of rotational or student-initiated prayer, in which some system is developed to allow each student a periodic opportunity to select the prayer to be recited for that day. While such a procedure does commend itself from the perspective of enlightening the school child as to the variety of religious beliefs that may be held by his or her peers, it is difficult to argue that this would lead to a stronger devotional opportunity for the child than would a silent prayer experience. Comparative religion courses are permitted now. Indeed, on the assumption that a typi-

cal classroom might contain students representing five denominational perspectives, for example, an individual student would be afforded only a single opportunity during each school week to participate in a personally meaningful religious experience. This contrasts with the silent prayer experience in which every child could be accommodated every day in the recitation of a personally meaningful prayer.

As an alternative to the selection of an oral prayer that would have to undergo a committee process, or else an alternative procedure in which the child is able to recite a personally significant prayer on an occasional basis, a silent prayer amendment would allow every child in the public school to pray, in as intense a manner as he or she desires, to whatever religious values were most holy to that person. Every school child could be accommodated in his personal expression of religious values on a daily basis.

As Prof. Michael Malbin, one of the leading authorities on the first amendment, has observed, "Silent prayer is an important part of almost every religion."[91] In the Confessions, St. Augustine vividly described the "hushed" silence in which he and his mother experienced a mystical vision of God.[92] The common Christian view in the era of The Fathers is expressed by St. Gregory of Nazianzus: "To speak of God is an exercise of great value, but there is one that is worth much more, namely to purify one's soul before God in silence."[93] Later Christian schools of spirituality taught that wordless prayer was the highest form of adoration. St. John of Damascus distinguishes two kinds of prayer: "the ascent of the mind to God," i.e., mental prayer, and "decently beseeching him," i.e., vocal prayer.[94] The so-called "Jesus Prayer," the most famous monologistic prayer—that is, prayer in the form of internal soliloquoy—passes from vocalization to wordless meditation by those who make use of it.

In the Jewish religion, the lengthy Amidah, or silent prayer, comes in the middle of every service, at least three times every day. The earliest Judaeo-Christian scriptures clearly reflect this attitude. "Be silent, O all flesh, before the Lord: for he is raised up out of his holy habitation." (Zechariah 2:13); "Be still and know that I am God" (Psalm 46:10); "Hold thy peace at the presence of the Lord God" (Zephaniah 1:7); "The Lord is in his holy temple: let all the earth keep silence before him" (Habakkuk 2:20); "While gentle silence enveloped all things * * * the all-powerful word leaped from Heaven" (Wisdom of Solomon 18:14). The delight of the righteous man is said (Psalm 1:2) to be "in the law of the Lord; and in his law doth he meditate day and night." In Psalm 19:14, the Psalmist prays, "Let the words of my mouth, and the meditation of my heart, be acceptable in thy sight * * *." In Psalm 143:5, the Psalmist declares, "I meditate on all thy works." And, again, Psalm 119:15, "I will meditate in thy precepts."

This tradition underlies silent prayer and meditation in the New Testament as well. It sheds light on the seeming paradox of Jesus'

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[91] Testimony before Subcommittee on the Constitution, June 27, 1983.
[92] Confessions of St. Augustine, Book 9 section X.
[93] Orations, 26. Cited in Hastings Encyclopedia, at 512.
[94] St. John of Damascus. de Fide Orthodoxa 3:24. Cited in Cross, F.L., ed. Oxford Dictionary of the Christian Church. London, Oxford University Press, 1966. "Prayer," at 1096.

words in Matthew 6:5–8 and 6:9–15. In the first passage he counsels his disciples to seek solitude for private prayer, directing them to withdraw to their "closet," i.e., the small prayer-room above the porch or entrance, in which devout Jews prayed and meditated. "Pray to your Father who is in secret" (Matthew 6:6a). In the second passage he instructs the disciples to "pray then like this" (Matthew 6:9), and follows with the prayer known as the Lord's Prayer. The admonition to secret (i.e., private) prayer should be seen in the context of his emphasis upon solitude for interior prayer (cf: Matthew 14:3, Luke 4:42, and Mark 6:32) and his warnings against the potential danger of hypocrisy in formal, public prayer. Later Christian tradition—Catholic, Protestant, and Orthodox—continued these practices of silent prayer and meditation alongside the various forms of vocal and corporate (liturgical) prayer. Thus, "The Oxford Dictionary of the Christian Church" defines meditation as "devout reflection on a chosen theme," usually Biblical, to stimulate the will and the affections.[95] Once a body of Christian Scripture had come into being (the New Testament), it too provided material for meditation. The silent meditation upon Scripture gave meaning to the Latin meditari, to practice, to be exercised in, to reflect, in the devotional life of Christians.

The practice of silent prayer in a Christian context is clearly attested to in St. Paul's Epistle to the Romans (8:26 ff.) where "unspoken aspirations * * * engendered by the Spirit * * * [are presented] to the Father as intercessions."[96] The Pauline emphasis upon the place of wordless prayer in the power of the indwelling Spirit is thoroughly consonant with the evangelical tradition in Christianity. It further appears that from the earliest times the eucharistic prayer in the Christian liturgy was recited sub silentio, reflecting the awe which believers felt before the Holiness of God. (cf: I Corinthians 11:26–33).

Public—that is, liturgical—prayer was associated with the community of worshippers, sharing a common faith. Thus, as late as St. Cyril of Jerusalem's time (d.386 A.D.) the public recitation of the Lord's Prayer was restricted to the baptized—that is, to those who had been received into full membership.[97] A distinction may be made between the corporate prayer of the worshipping community and the inward communion of the individual believer with God in private prayer. Both would seem to be sanctioned in the New Testament, Meditation and silent prayer, like all other forms of Christian prayer, are theistic and Christocentric, and should be distinguished from meditative practices in Eastern religions (Hinduism, Buddhism, Taoism) whose context is union with some form of impersonal reality and absorption of the self. External similarities (in the use of meditation or of silent prayer), as with vocal or corporate prayer (also found in all great religions, often associated with theistic beliefs), do not alter the profound difference in faith

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[95] Oxford Dictionary of the Christian Church. Ed. by F.K. Cross 2d edition, revised. Oxford University Press, 1978, at 898.

[96] Baker's Dictionary of Theology, at 413.

[97] See Simpson, Robert L. The Interpretation of Prayer in the Early Church. Philadelphia, Westminster Press, 1965; Leech, True Prayer, at 23; Foster, the Celebration of Meditative Prayer, Christianity Today, Oct. 7, 1983, at 22.

which separate a theistic from a non-theistic (or trans-theistic) context of faith.

An analysis by the Library of Congress has concluded also that silent prayer devotional practices are "found in all major world religions, including Hinduism, Buddhism, Islam, and Shintoism.[98] According to this analysis, "Religious silence—that is, silence as a form of prayer, meditation, or spiritual exercise—has been practiced by some at all times and places and in all periods of religious history.[99]

Silent prayer then, in our opinion, carries no less potential for communication an intense and devout religious experience for the school child than does vocal prayer. Those of its supporters who perfer the silent prayer amendment (and not all who support it prefer it) do not do so because they wish to allow a less passionate and meaningful religious experience for the school child but because they see silent prayer as an essentially personal experience, with vocal prayer being a more communal one. While they support the proposed amendment because they believe the relationship between church and state has grown unnecessarily hostile over the past two decades, they do not, however, see the public school as essentially a religious community. As Professor Malbin has concluded:

> In its communal role, the school should stand for the proposition that prayer or meditation have legitimate roles *within* the political community. As a political community, however, we must be open to those who disagree on matters of faith. That is a bedrock principle of our constitution regime.[100]

B. SILENT PRAYER AS "TRIVIAL"

A silent prayer amendment had also been criticized as pursuing an essentially "trivial" result. According to this view, it would be a waste of resources, and a misdirected use of energy, to attempt to effect a constitutional change of such a limited impact.

Much of this criticism, we believe, belies confusion about S.J. Res. 2 and misinterprets the intended objectives of such an amendment. Two points, in particular, need to be clarified with respect to the scope of the immediate amendment.

(1) First, several opponents of any amendment have attempted to divide supporters of prayer amendments by suggesting that silent prayer is a currently acceptable practice. As Prof. Grover Rees of the University of Texas Law School has responded, however:

> This statement is both correct and trivial. One can do anything anywhere so long as one is careful to do it in such a way that nobody notices. The use of the term "right" to denote the fact that one can pray with impunity so long as one prays silently would entail a radical reappraisal of the extent to which human rights should be said

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[98] Whittier, Silent Prayer and Meditation in World Religions, Congressional Research Service, May 27, 1983, at 7.

[99] Id., at 1.

[100] Testimony before Subcommittee on the Constitution, June 27, 1983.

> to exist in totalitarian and authoritarian regimes around the world. In this sense of the word, students have the right to pray in school not only in the United States but also in the Soviet Union. Citizens of South Africa and Cambodia have the right to call for the overthrow of the government so long as they do it silently.[101]

S.J. Res. 2 is designed to achieve far more than to merely allow students to privately pray during some random moment in the school-day when the attention of the teacher is focused elsewhere. Rather, it is to provide a formal, structured opportunity during the school-day when each student can silently speak to his Creator in a manner of his choosing. The opportunity to express such prayer would be sanctioned and facilitated by the State, with the local embodiment of that authority—the teacher—responsible for administering this opportunity. While the prayer itself would be a silent and personal one, the opportunity for the prayer experience would be a communal one. To liken this state of affairs to the status quo where one's "right to pray" results simply from the inability of the public authorities to mind-read is to transform a substantial change in the law into a "trivial" one.

(2) Second, other opponents of any amendment have attempted to divide supporters of prayer amendments by suggesting that even moments of group or communal silence are presently acceptable in the public schools. This argument, too, is disingenuous and misleading. Of course, it is true that teachers and other school authorities are able to enforce moments of silence—both for disciplinary and other purposes. The present amendment, however, is not limited in allowing moments of silence purely for secular purposes; indeed, it is explicit that such periods may be utilized for unambiguously religious purposes ("silent prayer"). As Prof. Walter Dellinger of the Duke University Law School has observed, "adding the word prayer is the issue." [102] The extent to which moments of silence are consistent with the Constitution, where they are directed specifically toward the encouragement of religious reflection is discussed further in section IV. Suffice it to say here that those who contend that group periods of silence are currently acceptable are again confusing issues of substance with purely "trivial" ones.

To the extent then that it is understood that S.J. Res. 2 achieves something far more substantial than either (1) the acknowledgment that individuals are already free to think their own thoughts, including religious thoughts, whenever they choose; or (2) the acknowledgment that public school authorities may already require silence on the part of students for legitimate school purposes, including discipline or study time; the proponents of this amendment strongly reject the notion that the proposed measure is "trivial."

We do not believe that it is "trivial" for the U.S. Congress and the legislatures of the States to affirm in the permanent organic law of the land the proper (albeit lost) understanding of the first amendment's "establishment clause" that there is a proper, supportive relationship between the State and expressions of religious

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[101] Rees, "Memorandum on Silent Prayers and the Federal Courts," printed in Senate hearings (97th Cong. 2d sess.) at 391.

[102] Testimony before Subcommittee on the Constitution, June 27, 1983.

values. Nor do we believe that it is "trivial" to affirm the proper (albeit lost) understanding that the education of future generations of American youth ought to appropriately consist of the development of spiritual character, in addition to their mental, physical, cultural, and vocational skills. Finally, we do not believe that it is "trivial" to reverse the unmistakable constitutional trend of the past two decades during which an atmosphere of increasing antagonism between church and state has been established as the Law of the Land and during which time consideration of all transcendental values has been effectively removed from the public schools of the Nation.

In summary, while proponents of S.J. Res. 2 recognize the preference of some supporters of school prayer for alternative constitutional formulations (and several proponents of S.J. Res 2 would share this preference), we do not believe that the reinstitutionalization of a constitutional regime in which religious believers can express themselves in a public school environment would be "trivial." Indeed, we believe that a restoration of the proper balance between church and state in our society, and the dismantling of the unbridgeable "wall of separation" between the State and all things of a spiritual character, could well be one of the most important of constitutional changes.

C. NECESSITY OF A CONSTITUTIONAL AMENDMENT

Prior to the Supreme Court's decision in *Jaffree* v. *Wallace*, some had criticized S.J. Res. 2, and similar proposals in earlier Congresses, on the grounds that the Court had never explicitly outlawed silent prayer. They argued that there was, therefore, no need for a constitutional amendment to provide for such prayer. Implicit in their argument was the suggestion that silent prayer in the public schools was consistent with Court interpretations of the first amendment.

The *Jaffree* decision, however, had dealt a critical, indeed probably fatal, blow to this argument. It is the view of the Committee that the *Jaffree* decision effectively prohibits silent prayer in public schools. Therefore, the Committee believes that S.J. Res. 2 is an appropriate response to *Jaffree* and other decisions which have construed the establishment clause.

The Committee acknowledges that some will continue to argue that the Supreme Court has never expressly prohibited silent prayer in public schools, including its *Jaffree* decision. The following points are relevant, in our view, in weighing the resulting suggestion that the proposed amendment, therefore, addresses a "non-problem".

(1) Although the Supreme Court had never expressly outlawed silent prayer, they had effectively outlawed it even prior to Jaffree. Virtually without exception, jurisdictions throughout the country which allowed all forms of prayer prior to the decisions in *Engel* and *Abington* have refused to allow any expressions of prayer following these decisions. They have refused to do so largely on the grounds that the principles enunciated by the Court in striking down vocal prayer were equally applicable to silent prayer. This does not appear to have been an entirely unreasonable belief on

the part of such jurisdictions. However reasonable this conclusion, the fact remains that virtually all jurisdictions which had permitted disparate forms of prayer prior to the 1962 and 1963 decisions immediately discontinued all such forms of prayer following these decisions. The widespread perception among school boards, school administrators, teachers, parents, and the public generally is that all forms of public school prayer were stricken down as unconstitutional by the Supreme Court. The *Jaffree* decision can only reinforce this perception.

(2) Thus, even though the Court may never have expressly spoken on silent prayer prior to Jaffree, it had repeatedly spoken on the meaning of prayer and the first amendment generally. It had done so in terms that, in the view of many reasonable observers, precludes any form whatsoever of Government-sponsored or sanctioned prayer. At the very least, the Court in its prayer decisions has effectively "chilled" virtually all expressions of public school prayer, in whatever form.[103]

(3) It should not be necessary then to require that citizens who wish to restore prayer must await an explicit decision of the Court on each and every prayer statute before they conclude that constitutional change is appropriate. The Court is under no obligations whatsoever to reconsider the issue of silent prayer or any other issue relating to prayer. They may choose never to hear every possible aspect of this controversy.[104] The unmistakable reality that confronts this Committee is that virtually every community in this Nation, for two decades, has effectively been deterred from allowing any form of prayer because they have labored under the belief (whether or not a misconception) that the principles articulated in *Engel, Abington,* and other decisions were as controlling on the issue of silent prayer as on any other matter of school prayer. Again, *Jaffree* can only enhance this belief.

The Court has stated, in the way of articulating general principles on the meaning of the "establishment clause," the following, for example:

> ● Neither [a State nor the Federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another.[105]
>
> ● [The purpose of the first amendment was to create] a complete and permanent separation of the spheres of reli-

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[103] Great reliance has been placed by some upon Justice Brennan's dictum in *Abington* v. *Schempp,* 374 U.S. 203, 281 (1963), that "even the observance of a moment of reverent silence" may not be inconsistent with the "establishment clause." Apart from the fact that this statement occurred as dictum in a concurring opinion, it is important to understand the context of these remarks. Not only was Justice Brennan attempting primarily to demonstrate that there were alternatives to vocal prayer (which was the issue in the case) that had "not been shown" to be objectionable, but he was arguing that even silent prayer could serve totally secular objectives of the sort that would pass muster under the first amendment. As Professor Rees of the University of Texas Law School has observed, "Justice Brennan's remarks would seem to have no application at all to an official moment of silent prayer or meditation that was not intended to serve only secular purposes." Memorandum of Professor Rees, quoted in Senate hearings (97th Congress, 2d session) pp. 392-3.

[104] This is particularly true if the Congress ultimately approves legislation which has been the subject of serious consideration over the past few years to eliminate much of the remaining mandatory jurisdiction of the Supreme Court. See, e.g. S. 833 (99th Congress).

[105] *Everson* v. *Board of Education,* 330 U.S. 1, 15 (1947).

gious authority and civil authority by comprehensively for bidding every form of public aid or support for religion.[106]

- [The public school] is organized on the premise that secular education can be isolated from all religious teaching. * * *[107]
- [T]he state cannot forbid, neither can it perform or aid in performing the religious function. * * * It cannot be made a public one by legislative act.[108]
- Separation is a requirement to abstain from fusing functions of government and of religious sects. * * *[109]
- [S]eparation must be complete and unequivocal. The First Amendment, within the scope of its coverage, permits no exception.[110]
- [A] union of government and religion tends to destroy government and to degrade religion.[111]
- [T]he concept of neutrality * * * does not permit a state to require a religious exercise. * * *[112]

Thus, while lawyers may be prepared to claim, in light of *Jaffree*, that some silent prayer statutes might pass constitutional muster, the proponents of S.J. Res. 2 consider it significant that the overwhelming number of jurisdictions around the country have, on their own, interpreted these principles to apply to any form of religious exercise whatsoever in the public school classroom.

(4) It is not merely public school authorities who have interpreted existing Court decisions in this manner, but also most Federal courts that have had the opportunity to consider the issue. Of the five lower Federal courts that have reviewed the specific issue of silent prayer, four of them have found such prayer to be in violation of the U.S. Constitution.[113] In other words, whatever interpretations innovative and creative lawyers wish to accord to High Court decisions on prayer, the explicit law of the land in at least the regions of the United States within the jurisdiction of these lower Federal courts is that silent prayer is unconstitutional.[114]

(5) Citizens of the United States then are being denied the opportunity today (and have been for the past two decades) to engage in any form of school prayer because of a confluence of governmental actions—court decisions, policies of local school authorities, inac-

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[106] Id., at 31-2 (Rutledge, J., dissenting).
[107] Id., at 23-4.
[108] Id., at 52 (Rutledge, J., dissenting).
[109] *McCollum* v. *Board of Education*, U.S. 203, 227 (1948).
[110] *Zorach* v. *Clausen*, 343 U.S. 306, 312 (1952).
[111] *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962).
[112] *Abington* v. *Schempp*, 374 U.S. 222, 225 (1963).
[113] *Beck* v. *McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982); *Duffy* v. *Las Cruces*, 557 F. Supp. 1013 (D.N. Mex. 1983); *Jaffree* v. *Wallace*, 705 F. 2d 1526 (11th Cir. 1983); *May* v. *Cooperman*, Civ. No. 83-89 (D.N.J. October 24, 1983); *Contra*, *Gaines* v. *Anderson*, 421 F.Supp. 337 (D. Mass. 1976).
[114] For a glimpse at the state of mind of the academic legal community on the constitutionality of silent prayer under current law, see Seide, "Daily Moments of Silence in Public Schools: A Constitutional Analysis," 58 N.Y.U.L.R. 364 (1983) ("While daily moments of silence might be a well-intentioned effort to accomodate religion in the public schools, they are constitutionally infirm because they are religious activities, no different for analytical purposes than sectarian, nondenominational or voluntary prayers."); Id. at 406. Note, "The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools," 96 Harv. L. Rev. 1874 (1983) ("A close examination of the circumstances in which these statutes were passed and the setting of the public school classroom in which they take effect suggests that they may violate all three prongs of the Supreme Court's current establishment clause test . . ."). Id., at 1893. See also Fogel, "A Roar From a Moment of Silence," Washington Post, Mar. 9, 1983, at A25.

tion by legislative bodies. It is perfectly proper for these citizens to respond to this situation by offering an amendment to the Constitution clearly stating the nature of their rights regarding prayer and extending to these rights express constitutional protection. Even if the Supreme Court is deemed not to have finally spoken on silent prayer, the article V process is an appropriate one here. Most earlier constitutional amendments have not come in direct response to Court decisions.

(6) The Supreme Court is not the sole arbiter of what is and what is not constitutional. There is a responsibility in the legislative branch of Government as well. If Congress believes that silent prayer would be inconsistent with existing interpretations of the Constitution (however much it might be in disagreement with the soundness of those decisions), it is perfectly appropriate for Congress to conclude that a constitutional initiative is apt.

(7) The Supreme Court is perpetually free to reconsider old interpretations of the Constitution and to promulgate new ones. The suggestion that the Court has not "finally spoken" on every silent prayer statute is thus, not simply unknowable, but equally correct with regard to any other matter of constitutional controversy. So long as the Court sits, it cannot be assumed to have "finally spoken." To say that a silent prayer amendment is "unnecessary" because the Court may someday issue a favorable decision is no different than arguing that the Equal Rights Amendment is unnecessary because the Court may someday reconsider its previous decisions in interpretation of the amendment, e.g., *Frontiero* v. *Richardson*.[115] Nor is it different from arguing that a proposal to "strip" Federal courts of jurisdiction over some matter is unnecessary because the Court may someday reconsider *Marbury* v. *Madison*.[116]

(8) Finally, had the policy of waiting to act until a "final" court decision was handed down been the prevailing sentiment in 1789, this country would never have had its Bill of Rights. Opponents of these amendments argued, in part, that its inclusion in the Constitution should await the realization of the feared dangers. Indeed, with respect to school prayer, the feared "dangers" have already come to pass.

Proponents of S.J. Res. 2 believe then that those who favor the concept of silent prayer are acting in a prudent and appropriate manner in proposing this measure as an amendment to the U.S. Constitution. We can see no meaningful distinction in this country today in the treatment of vocal or silent prayer in either a constitutional or a practical sense.

In summary, whatever points of disagreement there are among proponents of S.J. Res. 2 on the relative merits of alternative prayer amendments, we conclude that (a) a silent prayer amendment is wholly compatible with the notion that school-children ought to be afforded an opportunity for a strong statement of personal religious devotion in the classroom; (b) a silent prayer amend-

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[115] 411 U.S. 677 (1973). In *Frontiero*, the Court refused to obviate the need for the ERA by interpreting the 14th amendment to require "strict scrutiny" to be given to all legislative classifications based upon sex.

[116] 1 Cranch (5 U.S.) 137 (1803).

ment would achieve objectives that are substantial ones; and (c) a silent prayer amendment represents an appropriate, present exercise of the authority of Congress under article V to propose amendments.

IX. Public Opinion

Public support for the concept of a school prayer constitutional amendment has been remarkably consistent since the Supreme Court decisions in *Engel* and *Abington*. While public opinion polls on complex subjects of controversy must always be read carefully, recent polls continue to show strong public support for a prayer amendment.[117] Some of the more recent polls are summarized as follows:

(1) Gallup Poll (May 8, 1980).

AMENDMENT PERMITTING PUBLIC SCHOOLS PRAYERS

[In percent]

	Favor	Oppose	No opinion
Latest	76	15	9
1974	77	17	6

(2) CBS News-New York Times (May 2, 1981).

Question. "Do you favor or oppose an amendment to the Constitution that would permit prayers to be said in the public schools?"

[In percent]

	Total	Lib	Mod	Con	Gallup Apr. 1980	Gallup 1974
Favor	76	68	78	79	76	77
Oppose	18	28	17	15	15	17
No opinion	6	4	5	6	9	6

(3) Time-Yankelovich (June 1, 1981).

Seventy-four percent favored a constitutional amendment permitting school prayer.

(4) NBC News (June 4, 1981).

Prayers in public schools:

Question. "Do you favor or oppose an amendment to the Constitution that would permit prayers to be said in public schools?"

	Percent
Favor	73
Oppose	21
Not sure	6

(5) Los Angeles Times (October 4, 1981).

Question. "Generally speaking, do you approve or disapprove of allowing prayer in public schools?"

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[117] See, generally, "Public Opinion," June/July 1982, at 40.

[In percent]

	Men	Women	18 to 29 years	65 plus years	Not HS grad	Some college	Total
Approve	73	81	72	82	79	73	78
Disapprove	22	17	26	17	18	22	19
Not sure	5	2	2	1	3	5	3
Refused	0	0	0	0	0	0	0

(6) ABC News-Washington Post (March 10, 1982).

Question. "On the subject of the reading of prayer in public schools, do you approve or disapprove of schools having a required time for the regular reading of prayer?"

	Percent
Approve of required time	69
Disapprove of required time	28
Don't know/no opinion	3

(7) CBS News-New York Times (May 6, 1982).

Question. "What is your opinion? Should organized prayer in the public school be permitted or forbidden?"

[In percent]

	Total	Republican	Democrat	Independent
Permitted	69	73	74	61
Forbidden	18	16	15	21
Depends (voluntary)	7	6	6	10
No opinion	6	5	5	8

(8) NBC News-Associated Press (May 24, 1982).

Question. "Do you favor or oppose an amendment to the Constitution that would permit organized prayer in public schools?"

[In percent]

	Liberal	All
Favor	55	68
Oppose	39	27
Not sure	6	5

(9) Gallup (June 10, 1982).

Question. "Do you favor a school prayer constitutional amendment?"

[In percent]

	Favor	Oppose	No opinion
National	79	16	5
Church members	83	13	4
Nonmembers	68	24	8
Regular attendees	86	9	5
Nonregular attendees	73	21	6
Protestants	82	13	5
Catholics	82	11	7

(10) Newsweek (October 18, 1982).

Question. "Would the following position make you more or less likely to vote for the congressional candidate who took it?"

Favored a return to allow prayer in public schools:	*Percent*
More likely	59
Less likely	18

(11) Newsweek (June 27, 1983).

Question. "Do you approve or disapprove of this proposed change in educational policy?"

A constitutional amendment that would permit prayer to be said in public schools:	*Percent*
Approve	71
Disapprove	25
Don't know	4

(12) Gallup (September 8, 1983).

Question. "Have you heard or read about a proposed amendment to the U.S. Constitution that would allow voluntary prayer in the public schools?"

Eight in 10 (82 percent) replied in the affirmative. This "aware" group was then asked: "Do you favor or oppose this proposed amendment?" "How strongly do you favor (oppose) this proposed amendment—very strongly, fairly strongly, or not at all strongly?"

Here are the national findings:

Voluntary school prayer

[Based on aware group]	*Percent*
Favor—Total	81
Very strongly	48
Fairly strongly	29
Not at all strongly	4
Oppose—Total	14
Not at all strongly	2
Fairly strongly	5
Very strongly	7
No opinion	5
Grand total	100

Here are the results by key population groups:

VOLUNTARY SCHOOL PRAYER

[Based on aware group; in percent]

	Favor	Oppose	No opinion
National	81	14	5
Men	79	16	5
Women	83	12	5
Whites	79	15	6

VOLUNTARY SCHOOL PRAYER—Continued

[Based on aware group; in percent]

	Favor	Oppose	No opinion
Non-Whites	91	7	2
18 to 29 years	77	18	5
30 to 49 years	79	15	6
50 and older	85	10	5
College education	72	21	7
High school	84	11	5
Grade school	94	5	1
Catholics	84	10	6
Protestants	84	11	5
Baptists	91	6	3
Methodists	82	11	7
Republicans	85	10	5
Democrats	81	14	5
Independents	77	16	7
East	81	16	3
Midwest	85	10	5
South	86	9	5
West	67	25	8

At the same time that polls show strong majorities in favor of school prayer, they also demonstrate that the American people have equally strong opinions on other aspects of church-state relations. For example, they seem to be opposed to the idea of direct governmental aid to religious schools.[118] In short, the American people are not uncritical of proposals which, in their view, seem to violate the traditional notion of separation of church and state, but at the same time make clear their opposition to proposals which place these institutions in positions of mutual antagonism.

(13) Gallup Poll (September 8, 1983)

Question. "Do you favor or oppose this proposed amendment to permit voluntary prayer in the public schools?"

	Percent
Favor	81
Oppose	14
No opinion	5

(14) Gallup Poll (November 18, 1984)

Question. "Would you tell me whether you generally favor or generally oppose each of these proposals?"

[In percent]

	Favor	Oppose	No opinion
Prayer in public schools	69	28	3

(15) Center for Political Studies (January 7, 1985)

[118] See, for example, Adams, American Public Opinion in the 1960's on Two Church-State Issues, "Journal of Church and State," Autumn 1975, pp. 477-94. Professor Malbin further observes that public support for school prayer tends to drop 10-15 percent to the extent that poll questions are phrased to suggest specific "organized group prayers" and the like. Testimony before Subcommittee on the Constitution, June 27, 1983.

Question. "Which do you think—schools should be allowed to start each day with a prayer, or religion does not belong in the schools?"

	Percent
Should be allowed	65
Religion does not belong	26
Other/depends	8

X. Conclusion

Under our system of Government "of the people, by the people, for the people," the stability of the Republic ultimately rests upon the character and will of its citizenry. The Nation's long-term welfare depends upon its citizens to vote responsibly, to conform their conduct to the dictates of the law, to participate on juries, to partake in community activities, to raise children, to assist neighbors, and to perform countless other voluntary acts contributing to the social fabric.

A proper education for such a role may require more than learning to punch computer keys, to construct edifices or to understand foreign languages; rather, it may include the building of integrity and a sense of honesty, inculcation of a structure of lasting values, and an encouragement of a willingness to serve one's country. Education, in this sense, includes preparation for the responsibilities of citizenship.

Thus defined, education may well be served by an opportunity to acknowledge or ponder the source of our liberties as articulated by the Declaration of Independence: "We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." It may well be appropriate that our public educational institutions afford the student the opportunity to consider this relationship within the broader context of the educational process.

Perhaps no American figure has given more enlightened utterance on the connection between our Nation's religious and moral heritage and its freedoms than its first President, George Washington. In his Farewell Address of September 17, 1796, President Washington stated:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of man and citizens . . . A volume could not trace all their connections with private and public felicity . . . And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason, and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.
>
> It is substantially true that virtue or morality is a necessary spring of popular government. The rule indeed ex-

> tends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric? Promote, then, as an object of primary importance, institutions for the general diffusion of knowledge.

It is not insignificant that President Washington closed his exhortation to his country regarding the importance of its religious heritage to a free Nation with a recommendation that the Nation promote its educational institutions. He seemed to be espousing the importance of a broader educational experience as an essential element of a healthy, working democracy. This, in fact, was the spirit that has animated the authorship of the first amendment and the constitutional practice of voluntary prayer in public schools and other national institutions, including the Congress, for nearly two centuries. We believe that this spirit ought to be reaffirmed by adoption of S.J. Res. 2.

XI. Miscellaneous

A. COST ESTIMATE

Pursuant to section 252(a) of the Legislative Reorganization Act of 1970 (Public Law 91-510), the Committee estimates that there will be no costs to the Federal Government resulting from the passage of this resolution or the adoption of the proposed amendment as part of the United States Constitution.

B. REGULATORY IMPACT STATEMENT

In compliance with subsection 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee finds that S.J. Res. 2 will not result in increased paperwork or regulation.

C. BUDGETARY IMPACT

U.S. Congress,
Congressional Budget Office,
Washington, DC, October 8, 1985.

Hon. Strom Thurmond,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S.J. Res. 2, a joint resolution proposing an amendment to the Constitution of the United States relating to voluntary silent prayer or reflection, as ordered reported by the Senate Committee on the Judiciary, October 3, 1985.

We estimate that no costs to the federal government or to state or local governments would result from enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

Rudolph G. Penner.

XII. Attachment A

STATE PROVISIONS RELATING TO PRAYER AND BIBLE READING IN THE PUBLIC SCHOOLS AT THE TIME OF *ENGEL* AND *ABINGTON*

At the time that the decisions in *Engel* and *Abington* were rendered, Bible reading was required by State law in 12 States plus the District of Columbia and was expressly permitted by an additional 17 States. Prayer was required by one State plus the District of Columbia and permitted under State law in an additional 17 States. Nine States prohibited both practices. Twelve States had no provisions regarding Bible reading, while 23 States had no provisions regarding prayer.

State	Provisions at time of Engel and Abington decisions	
	Bible reading	Prayer
Alabama	Required[1]	
Alaska	Prohibited[2]	Prohibited[2]
Arizona	Prohibited[1]	Prohibited[1]
Arkansas	Required[1]	Permitted[1]
California	Prohibited[3]	Prohibited[3]
Colorado	Permitted[4]	Permitted[4]
Connecticut		
Delaware	Required[1]	Permitted[1]
District of Columbia	Required[2]	Required[2]
Florida	Required[1, 4]	Permitted
Georgia	Required[1, 4]	Permitted[4]
Hawaii	Permitted[2]	Permitted[2]
Idaho	Required[1]	
Illinois	Prohibited[4]	Prohibited[4]
Indiana	Permitted[1]	
Iowa	Permitted[1, 4]	
Kansas	Permitted[1, 4]	Permitted[4]
Kentucky	Required[1, 3, 4]	Permitted[3, 4]
Louisiana	Prohibited[3, 4]	Prohibited[3, 4]
Maine	Required[1, 4]	Required[1, 4]
Maryland	Permitted[4]	Permitted[4]
Massachusetts	Required[1, 4]	Permitted[4]
Michigan	Permitted[4]	
Minnesota	Permitted[4]	
Mississippi	Permitted[1]	
Missouri		
Montana		
Nebraska	Prohibited[4]	Prohibited[4]
Nevada		
New Hampshire	Permitted[1]	Permitted[1]
New Jersey	Required[1, 4]	Permitted[1, 4]
New Mexico	Permitted[3]	
New York	Permitted[4]	Permitted[2, 4]
North Carolina		
North Dakota	Permitted[1]	
Ohio	Permitted[4]	
Oklahoma	Permitted[1]	
Oregon		
Pennsylvania	Required[1, 4]	Permitted[2]
Rhode Island		
South Carolina		
South Dakota	Permitted[4]	Permitted[4]
Tennessee	Required[1, 4]	Permitted[4]
Texas	Permitted[4]	Permitted[4]
Utah		
Vermont		

State	Provisions at time of Engel and Abington decisions	
	Bible reading	Prayer
Virginia		
Washington	Prohibited[4]	Prohibited
West Virginia		
Wisconsin	Prohibited[4]	Prohibited[4]
Wyoming	Prohibited[3]	Prohibited[3]

[1] By statute.
[2] By State board of education regulation.
[3] By opinion of State attorney general.
[4] By court decision.

Source: This table was prepared by the Congressional Research Service, June 6, 1983.

ATTACHMENT B

STATE PROVISIONS REGARDING MOMENTS OF SILENCE IN THE PUBLIC SCHOOLS

At the time of the Court's decision in *Jaffree,* 26 states had enacted silent meditation provisions. Massachusetts' statute had been judicially upheld, but the lower federal courts had struck down the provisions not only of Alabama but also of New Mexico, New Jersey, Tennessee, and West Virginia. In *Jaffree,* of course, the Supreme Court offerred no opinion as to the constitutionality of any particular provision other than Alabama's. The extent to which any of these laws has proven effective in restoring prayer has, of course, been minimal. No doubt, most of these statutes have not been challenged because they have been without significant effect.

The texts of the state silent meditation provisions, with pertinent judicial rulings noted, are as follows:

ALABAMA Code § 16-1-20 (Supp. 1984)

> At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activites engaged in. Acts 1978. No. 662. p. 955.

Code § 16-1-20.1 (Supp. 1984)

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in. (Acts 1981. No. 81-357. p. 523)
>
> (Second statute held unconstitutional in *Wallace* v. *Jaffree,* S. Ct. (1985)).

ARIZONA Rev. Stat. Ann. § 15-522 (1984)

At the commencement of the first class of the day in the schools the teacher in charge of the room in which the first class is held shall announce that a period of silence not to exceed one minute in duration will be observed for meditation, and during that time no activities shall take place and silence shall be maintained.

Added by Laws 1981, Ch. 1, § 2, eff. Jan. 23, 1981.

ARKANSAS Stat. Ann. § 80-1607.1 (1980)

(a) In each public school classroom, the teacher in charge may, or if so authorized or directed by the Board of School Directors by which he is employed, shall, at the opening of school upon every school day, conduct a brief period of silent prayer or meditation with the participation of all the pupils therein assembled who desire to participate.

(b) The silent prayer or meditation authorized by subsection (a) of this section is not intended to be, and shall not be conducted as, a religious service or exercise, but shall be considered as an opportunity for silent prayer or meditation on a religious theme by those who are so disposed, or a moment of silent reflection on the anticipated activities of the day. [Acts 1975 (Extended Sess., 1976), No. 1084, § 1. p. 2759.]

CONNECTICUT Gen. Stat. Ann. § 10-16a (Supp. 1985)

Each local or regional board of education shall provide opportunity at the start of each school day to allow those students and teachers who wish to do so, the opportunity to observe such time in silent meditation.

(1978. P.A. 78-218. § 13.) (As first enacted in 1975—P.A. 75-367, § 2-Connecticut's statute provided as follows: "The board of education of each town and of each regional school district shall provide opportunity at the start of each school day to allow those students and teachers who wish to do so, the opportunity to oberve such time in silent meditation.")

DELAWARE Code Ann. tit. 14 § 4101b (1981)

(b) During the initial period of study on each school day all students in the public schools of Delaware shall be granted 2 or 3 minutes to voluntarily participate in moral, philosophical, patriotic or religious activity. For purposes of this section, "religious activity" shall include voluntary prayer at the beginning of each school day.

(Enacted in 1975. Construed to be constitutional only to the extent that it authorizes *silent* prayer and other, non-religious activities. Op. Del. Atty. Gen. 79-I011 (1979).)

FLORIDA Stat. Ann. § 233.062(2) (1985 Supp.).

(2) The school board may provide that a brief period, not to exceed 2 minutes, for the purpose of silent prayer or meditation be set aside at the start of each school day or each school week in the public schools in the district.
Amended by Laws 1980, C. 80-336, § 1.

GEORGIA Code Ann. § 32-862-863 (Supp. 1984)

32-862 [20-2-1050] Period for silent prayer or meditation
(a) In each public school classroom the teacher in charge may or, if so authorized or directed by the board of education by which he is employed, shall, at the opening of school upon every school day, conduct a brief period of silent prayer or meditation with the participation of all the pupils therein assembled.
(b) The silent prayer or meditation authorized by subsection (a) of this Code section is not intended to be and shall not be conducted as a religious service or exercise but shall be considered as an opportunity for silent prayer or meditation on a religious theme by those who are so disposed or a moment of silent reflection on the anticipated activities of the day.
(Acts 1969, p. 488.)
32-863 [20-2-1051] Participation by students not required
No teacher, principal, school board or any other person may require or prescribe any particular method or manner in which a child shall participate in any period of silent prayer or meditation, but each child shall be absolutely free to participate therein or not, in such manner or way as such child shall personally desire, consistent with his or her beliefs.
(Acts 1969, p. 488.)

ILLINOIS Ann. Stat. ch. 122, § 771 (Supp. 1984)

§ 1. In each public school classroom the teacher in charge may observe a brief period of silence with the participation of all the pupils therein assembled at the opening of every school day. This period shall not be conducted as a religious exercise but shall be an opportunity for silent prayer or for silent reflection on the anticipated activities of the day.
P.A. 76-21, § 1, eff. July 1, 1969.

INDIANA Code Ann. § 20-10.1-7-11 (Burns Supp. 1984)

20-10.1-7-11. Voluntary religious observance—Silent period.—In each public school classroom, at the opening of each school day the teacher in charge may or, if directed by his governing body, shall conduct a brief period of silent prayer or meditation with the participation of all students assembled. This silent prayer or meditation is not a reli-

gious service or exercise and may not be conducted as one, but is an opportunity for silent prayer or meditation on a religious theme for those so inclined or a moment of silent reflection on the anticipated activties of the day. [IC 1971, 20-10.1-7-11, as added by Acts 1975. P.L. 240, § 1, p. 1289.]

KANSAS Stat. Ann. § 72-5308a (1980)

72.5308a. "Periods of silence" authorized. In each public school classroom the teacher in charge may observe a brief period of silence with the participation of all the pupils therein assembled at the opening of every school day. This period shall not be conducted as a religious exercise but shall be an opportunity for silent prayer or for silent reflection on the anticipated activities of the day.
L. 1969, ch. 310, § 24, July 1.

LOUISIANA Rev. Stat. Ann. § 17:2115(A) (West 1982)

A. Each parish and city school board in the state shall permit the proper school authorities of each school within its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in silent meditation, which shall not exceed five minutes. The brief time of silent meditation shall not be intended or identified as a religious exercise.
Added by Acts 1976, No. 226, § 1.

MAINE Rev. Stat. Ann. tit. 20-A, § 4805(2) (1983)

2. Period of silence. The school board of a school administration unit may require, at the commencement of the first class of each day in all grades in all public shcools in their unit, that the teacher in charge of the room in which each class is held shall announce that a period of silence shall be observed for reflection or meditation and during that period silence shall be maintained and no activities engaged in.
1981, c. 693, § 5, eff. July 1, 1983.

MARYLAND Education Code Ann. § 7-104 (1985)

(a) *Silence meditation.*—Principals and teachers in each public elementary and secondary school in this State may require all students to be present and participate in opening exercises on each morning of a school day and to meditate silently for approximately 1 minute.
(b) *Praying or reading holy scripture permitted.*—During this period, a student or teacher may read the holy scripture or pray. (An. Code 1957, art. 77, § 78; 1978, ch. 22. § 2.)

MASSACHUSETTS Gen. Laws Ann. tit. 71 § 1A (1982)

At the commencement of the first class of each day in grades in all public schools the teacher in charge of the

room in which each such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation or prayer and during any such period silence shall be maintained and no activities engaged in.

Added by St.1966. c. 130. Amended by St.1973. c. 621; St.1979, c. 692; St.1980, c. 144.

(Held to be constitutional in *Gaines* v. *Anderson*, 421 F. Supp. 337 (D. Mass. 1976).)

MICHIGAN Comp. Laws Ann. § 380.1565 (Supp. 1985)

Sec. 1565. The board of education of a school district may by resolution provide the opportunity during each school day to allow students who with to do so, the opportunity to observe time in silent meditation. * * * *The state board shall develop guidelines which a school board may use in the implementation of this section.*

P.A. 1976, No. 451, § 1565, Imd. Eff. 13, 1977. Amended by P.A.1977, No. 43, § 1, Imd. Eff. June 29.

NEVADA Rev. Stat. § 388.075 (1979)

388.075 Period of silence. Every school district shall set aside a period at the beginning of each school day, during which all persons must be silent, for voluntary individual meditation, prayer or reflection by pupils.

(Added to NRS by 1977, 634)—(Submitted in revision for NRS 389.013)

NEW JERSEY Stat. Ann. § 18A:36-4 (Supp. 1984)

Principals and teachers in such public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

L.1982. c. 205, § 1, eff. Dec. 17, 1982.

(Held unconstitutional in *May* v. *Cooperman*, 572 F. Supp. 1561 (D.N.J. 1983), *appeal docketed* Nos. 83-5890 (3d Cir. Dec. 10, 1983) and 84-5126 (3d Cir. Feb. 28, 1984).)

NEW MEXICO Stat. Ann. § 22-5-4.1 (1981)

Each local school board may authorize a period of silence not to exceed one minute at the beginning of the school day. This period may be used for contemplation, meditation or prayer, provided that silence is maintained and no activities are undertaken.

History: Laws 1981, ch. 296, § 1.

(Held unconstitutional in *Duffy* v. *Las Cruces Public Schools*, 557 F. Supp. 1013 (D.N. Mex. 1983).

NEW YORK Education Laws § 3029-a (McKinney 1981)

1. In each public school classroom, the teacher in charge may, or if so authorized or directed by the board of education by which he is employed, shall, at the opening of school upon every school day, conduct a brief period of silent meditation with the participation of all the pupils therein assembled.

2. The silent meditation authorized by subsection one of this act is not intended to be, and shall not be conducted as, a religious service or exercise, but may be considered as an opportunity for silent meditation on a religious theme by those who are so disposed, or a moment of silent reflection on the anticipated activities of the day. As used in subdivision one of this section the term "participation" shall be construed to permit seated participation and not to require any pupil to stand.

Added L.1971, c. 1204.

NORTH DAKOTA Cent. Code § 15-47-30.1 (1981).

15-47-30.1. Schools—Period of silence for meditation or prayer. At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or prayer, and during any such period, silence shall be maintained and no activities engaged in. The school board of any public school district may, in its discretion, direct that all public schools within that school district shall provide a period of silence in each classroom in accordance with the provisions of this section.

Source: S.L. 1981, ch. 211, § 1.

OHIO Rev. Code Ann. § 3313.601 (1980)

No board of education shall prohibit a classroom teacher from providing in his classroom reasonable periods of time for programs or meditation upon a moral, philosophical, or patriotic theme. No pupil shall be required to participate in such programs or meditations if they are contrary to the religious convictions of the pupil or his parents or guardians.

HISTORY: 133—§ 290. Eff 11-18-69

PENNSYLVANIA Stat. Ann. tit. 24 § 15-1516.1 (Supp. 1985)

(a) In each public school classroom, the teacher in charge may, or if so authorized or directed by the board of school directors by which he is employed, shall, at the opening of school upon every school day, conduct a brief period of silent prayer or meditation with the participation of all the pupils therein assembled.

(b) The silent prayer or meditation authorized by subsection (a) of this section is not intended to be, and shall not be conducted as, a religious service or exercise, but shall be considered as an opportunity for silent prayer or meditation on a religious theme by those who are so disposed, or a moment of silent reflection on the anticipated activities of the day.

1949 March 10, P.L. 30, art. XV, § 1516.1, added 1972, Dec. 6, P.L. 1412, No. 305, § 1, imd. effective.

RHODE ISLAND Gen. Laws § 16-12-3.1 (1981)

16-12-3.1. Period of silent meditation.--At the opening of every school day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of silence not to exceed one (1) minute in duration shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in.

History of Section. As enacted by P.L. 1977, ch. 84. § 1.

TENNESSEE Code Ann. § 49-1922 (1982)

At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which such class is held shall announce that a period of silence, not to exceed one minute in duration shall be observed for meditation or prayer or personal beliefs and during any such period, silence shall be maintained.

Acts 1982 (Adj. S), ch. 899, § 1.

(Enacted to replace prior 1976 statute providing for period for "prayer, meditation, or personal reflection" (Acts 1976 (Adj. S), ch. 463, § 1), but held unconstitutional in *Beck* v. *McElrath* 548 F. Supp. 1161 (M.D. Tenn. 1982) and replaced by following statute in 1983.)

——— Code Ann. § 49-6-1004 (1983)

49-6-1004. Period of silence or prayer.—(a) In order for all students and teachers to prepare themselves for the activities of the day, a period of silence of approximately one (1) minute in duration shall be maintained in each grade in public schools at the beginning of each school day. At the opening of the first class each day it shall be the responsibility of each teacher in charge of each class to call the students to order and announce that a moment of silence is too be observed. The teacher shall not indicate or suggest to the students any action to be taken by them during this time, but shall maintain silence for the full time. At the end of this time, the teacher shall indicate resumption of the class in an appropriate fashion, and may at that time make school announcements or conduct any other class business before commencing instruction.

Acts 1983, ch. 18, § 1.

VIRGINIA Code Ann. § 22-1-203 (1980)

§ 22.1-203. Daily observance of one minute of silence.—In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the State either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division is authorized to establish the daily observance of one minute of silence in each classroom of the division.

Where such one-minute period of silence is instituted, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice. (Code 1950. § 22-234.1; 1976, c. 103; 1980, c. 559.)

WEST VIRGINIA Constitution, Article III, § 15a (1984)

ARTICLE III. BILL OF RIGHTS.

§ 15a. Voluntary contemplation, meditation or prayer in schools.

Public schools shall provide a designated brief time at the beginning of each school day for any student desiring to exercise their right to personal and private contemplation, meditation or prayer. No student of a public school may be denied the right to personal and private contemplation, meditation or prayer nor shall any student be required or encouraged to engage in any given contemplation, meditation or prayer as a part of the school curriculum.

(Adopted by referendum in November, 1984, but held unconstitutional in *Walter* v. *West Virginia Board of Education*, Civ. No. 84-5366 (S.D. W.Va. Mar. 14, 1985).

Source: This compilation was prepared by the Congressional Research Service, June 20, 1985.

ATTACHMENT C

A particularly thought-provoking statement on public school prayer was made by former Harvard Law School Dean Erwin N. Griswold in 1963. He observed:

> When the prayer is recited [in public school], if [the dissenting] child or his parents feel that he cannot participate, he may stand or sit, in respectful attention, while the other children take part in the ceremony. Or he may leave the room. It is said that this is bad, because it sets him apart from other children. It is even said that there is an

element of compulsion in all this—what the Supreme Court has called an "indirect coercive pressure upon religious minorities to conform." But is this the way it should be looked at? The child of a nonconforming or minority group is, to be sure, different in his beliefs. That is what it means to be a member of a minority. Is it not desirable, and educational, for him to learn and observe this in the atmosphere of the school—not so much that he is different, as that other children are different from him? And is it not desirable that, at the same time, he experiences and learns the fact that his difference is tolerated and accepted? No compulsion is put upon him. He need not participate. But he, too, has the opportunity to be tolerant. He allows the majority of the group to follow their own traditions, perhaps coming to understand and to respect what they feel is significant to them.

Is this not a useful and valuable and educational and, indeed, a spiritual experience for the children of what I have called the majority group [as well]? They experience the values of their own culture; but they also see that there are others who do not accept those values, and that they are wholly tolerated in their nonacceptance.

[D]oes the fact that we have officially adopted [religious] toleration as our standard mean that we must give up our history and our tradition? The Moslem who comes here may worship as he pleases, and he may hold public office without discrimination. That is as it should be. But why should it follow that he can require others to give up their Christian tradition merely because he is a tolerated and welcomed member of the community.

Not long ago, I was in Tunisia, a country in which the overwhelming majority of the people are Moslem. While there, I expected to comply with their laws and customs. They are a tolerant people, and did not seek to compel me to participate in any of their religious observances. But it would have been most inappropriate to me to have taken advantage of this tolerance and to have sought to interfere with their customs simply because they were not mine.

In a country which has a great tradition of tolerance, is it not important that minorities, who have benefited so greatly from that tolerance should be tolerant too, as long as they are not compelled to take affirmative action themselves, and nothing is done which they cannot wait out, or pass respectfully by, without their own personal participation, if they do not choose to give it? [119]

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[119]Griswold, "Absolute is the Dark –A Discussion of the Approach to Constitutional Questions," 8 Utah Law Review 176-9, reprinted in Ferrara, Religion and the Constitution (1983, Free Congress, Washington, D.C.) at 61-2.

ADDITIONAL VIEWS OF MR. BIDEN

I support S.J. Res. 2, the constitutional amendment to permit silent prayer or reflection in public schools. But I do so for reasons that differ from the reasons of some of my colleagues on this Committee.

I have been a strong opponent of the type of school prayer constitutional amendment that the President proposed last year. That amendment would have allowed a teacher to choose any selection from any religious text—the Bible, the Koran, or even the text of a religious cult—and require students either to recite it aloud or leave the room. I believe that such a situation would impose an undue burden on students and violates the constitutional protection of their religious freedom.

The proposal before us today, on the other hand, would permit a moment of silence for prayer or reflection. During that period, a student may think privately about anything he or she chooses. I do not believe such a moment of silence places pressures upon students to conform to any religious belief.

In principle, students are free to pray silently whenever they want. But there is a general notion following the Supreme Court's recent decision in *Wallace* v. *Jaffree* that students are not allowed to pray during a moment of silence. This amendment is intended simply to counteract that notion. This amendment is not intended to tell children that they should pray during the moment of silence; it is intended simply to dispel the notion that they may not pray. It is my view that this amendment is neutral with regard to what a student thinks about during the moment of silence.

In conclusion I would like to quote Justice White's concise statement of the logic of allowing for a period of silent prayer or reflection. In his dissenting opinion in *Wallace* v. *Jaffree* Justice White stated:

> As I read the filed opinions, a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer. But if a student asked whether he could pray during that moment, it is difficult to believe that the teacher could not answer in the affirmative. If that is the case, I would not invalidate a statute that at the outset provided the legislative answer to the question "May I pray?"

JOSEPH R. BIDEN, Jr.

MINORITY VIEWS OF MR. MATHIAS

S.J. Res. 2 is a proposed constitutional amendment to authorize "individual or group silent prayer or reflection in public schools." Unlike S.J. Res. 73, which failed to obtain approval by the Senate during the 98th Congress, S.J. Res. 2 would permit only silent prayer rather than verbal prayers in the public schools. Despite this distinction between S.J. Res. 2 and the proposal defeated in the Senate last year, I believe that proper response to each is essentially the same. The existing constitutional prohibition of an establishment of religion, elaborated and enforced by the courts in the context of particular factual situations, has served our Nation well. To tamper with this framework by legislative action is both unnecessary and unwise. Furthermore, the proponents of a constitutional amendment have not demonstrated the compelling necessity which we should require before moving to modify, for the first time in our history, the Bill of Rights.

S.J. Res. 2 is yet another invitation to take a radical turn from the road down which our country has proceeded for nearly two centuries. The founders of the Republic knew well the mischief which arises when government meddles with religion. That is why they wrote into the Nation's fundamental charter the principle that "Congress shall make no law respecting an establishment of religion or prohibition the free exercise thereof * * *." In my view, that principle is neither a roadblock which needs to be removed, nor a problem which needs to be corrected. On the contrary, it is a tradition which we should celebrate and strengthen, for it stands at the foundation of the religious liberty which is among our most precious freedoms.

The decisions of the Supreme Court in *Engel* v. *Vitale* and *School District of Abington* v. *Schempp* established that government-sponsored recitations of prayer in public schools violated the establishment clause. The course of decisions on silent prayer in the schools is somewhat less clear. Much turns upon intent: did the legislature mandate a moment of silence for a secular purpose, or as an expedient way to provide a forum for religious activities? Even the most recent Supreme Court decision disapproving a moment of silence statute in *Wallace* v. *Jaffree,* turns on the purpose for the enactment. Justice Stevens writing for the majority of the court notes:

> The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day.

To that extent, S.J. Res. 2 is unnecessary, for a school board may already, within constitutional bounds, adopt a policy for an appropriate period of silence for meditation or prayer.

Only if the intent of the legislature is to advance religious exercises in the schools does it violate the Establishment Clause to provide a formal opportunity for silent prayer. That advancement is precisely what is intended by the proponents of S.J. Res. 2. As the majority report states, the purpose of the proposal is "to restore discretion to state or local authorities to structure a religious exercise" in a public schoolroom. The majority forthrightly states that "it is intended that the Government be authorized to sponsor such (silent) prayer. * * *

The conflict between the regime envisioned by the proponents of this resolution, and our existing framework of religious liberty, is readily apparent. Because the state-sponsored prayer period would be silent, the conflict is not quite as sharp as it would be under a proposal, such as S.J. Res. 73 in the 98th Congress, which would have authorized oral prayer recitations. But the principle is really no different, and the potential consequences are similarly disturbing.

Today, our public school classrooms are supposed to be dedicated to learning. But under S.J. Res. 2, they could be given over, once or twice or ten times a day, to devotional exercises. Today, questions of religious observance do not figure in the processes by which Americans select members of local school boards. But under S.J. Res. 2, the issue of whether or not to choose "to structure a devotional exercise" could be injected into the political arena.

My examination of the proposal contained in S.J. Res. 2 convinces me that the distinction between states sponsored silent and oral prayer is not of sufficient constitutional significance to justify a different position on the two approaches. A constitutional amendment to authorize either kind of prayer in public schools will irreparably breach the policy of separation of church and state which is the essence of the Establishment Clause of the First Amendment. This repudiation of the central principle of our Bill of Rights ought to be rejected.

CHARLES MCC. MATHIAS, JR.

MINORITY VIEWS OF MR. SIMON

While I understand the popularity of an amendment to allow silent prayer in public schools, I cannot support such a proposal, nor should my colleagues.

As Justice Sandra O'Connor wrote in her decision on the *Jaffree* case, "It is difficult to discern a serious threat to religious liberty from a roomful of silent, thoughtful schoolchildren." And, yet, whenever the Federal Government begins to make religious decisions for the people our first amendment right to worship according to our personal beliefs is threatened.

My father was a Lutheran minister. I am aware of the importance of religion and prayer in our daily lives. As legislators, each of our religious faiths helps to frame our positions on various matters, often in ways we do not know. But we must be infinitely careful to avoid the temptation to wrap ourselves in a thin cloak of religious posturing. Well meaning government intervention in religion is bad public policy.

We encourage religion through tax-exempt status, but there all religions and non-religions have equal status—and we are not dealing with the lives of children.

A former colleague of mine in the House of Representatives was Congressman Dan Glickman of Kansas. Dan happens to be Jewish. Every day in his fourth grade class, while the rest of the children recited a prayer, Dan would have to wait in the hallway until the prayer was finished. Everyday Dan Glickman was being told, you are different—everyday his classmates were told Dan Glickman is different. This is not a healthy lesson to teach our young people.

Voluntary silent prayer has never been sequestered in our public schools and I doubt there is a child on earth who has not offered up a few words for hope and guidance at some point in his or her school day.

The danger arises when we try to promote religion. Who then decides which prayer is taught? What happens to the student whose religious faith does not observe common prayer?

Sam Ervin, the wise man from North Carolina, once wrote, "If religious freedom is to endure in America, the responsibility for teaching religion to public school children must be left to the homes and churches of our land, where this responsibility rightfully belongs."

Senator Ervin was not an opponent of prayer, he was a student of history and understood that when government becomes entangled in religion the potential for abuse is great. Our founding fathers did not need history to teach them this lesson, they could see the principle at work first hand.

It was for these reasons that Thomas Jefferson called for a "wall of separation" between church and state. Though this expression went beyond the reality of the situation, it indicated the impor-

tance he placed on the basic issue. He did not intent an iron curtain between the people and their faith behind which the flower of religion could wither. Instead, he saw that religious faith and government should be shielded from popular passions and allowed to grow through the natural strength of the beliefs of its people.

As he wrote, "The truth is great and will prevail if left to herself . . . she is the proper and sufficient antagonist to error. Errors [cease] to be dangerous when [truth] is permitted to contradict them."

Religious faith will prosper if left to herself. Our religious freedom will continue as well if we allow parents and children to learn religion in their homes, churches and synagogues and not at the hands of the schools and the government. For religious faith to remain strong in America we do not need to force our children to pray.

PAUL SIMON.

MINORITY VIEWS OF MR. METZENBAUM—S.J. RES. 2

I have voted against this amendment because it does much more than simply allow voluntary prayer during a moment of silence in the public schools. If permitting voluntary prayer is the purpose behind this proposal, there is no need for an amendment. The proponents of this amendment, however, are not content with prayer resulting from the private and individual actions of schoolchildren. They insist on organized, group devotional exercises led by school officials.

The committee report makes clear that the purpose and effect of this amendment is to introduce organized religious activities into public classrooms:

> S.J. Res. 2 is not intended to alter any existing understanding of the first amendment, or more particularly its religion clauses, except to the extent that this is necessary *to restore discretion to State or local authorities to structure a religious exercise* consistent with the terms of this amendment. (Committee report at 26) (emphasis added)

The ominous proposition that local authorities are to "structure religious exercises" is the central problem with this amendment. According to the majority report, local officials are to be given wide discretion in deciding how these "religious exercises" are to be conducted. (See pp.—) They are to be authorized to:

> Sponsor such prayer to the extent of permitting the classroom teacher or other school administration to structure the opportunity for prayer by formally announcing the period for prayer, ensuring discipline during the period for prayer, and formally concluding the period for prayer.

The report makes clear that the religious activities will extend beyond simple silent prayer. The authors of the amendment contemplate the use or prayer cards and rosary beads. (See p. 28)

I do not doubt that there is widespread support for allowing children to pray in school. However, there is also widespread misunderstanding of what is allowed under current law. No serious legal scholar would argue that there is a constitutional prohibition on children praying silently any time during the school day, or for that matter, praying aloud within the context of school decorum and disciplinary requirements. This freedom stems from the fact that the Constitution provides strong protection to individual religious activities and expressions of views.

Proposals to amend the Constitution in order to allow prayer in school, however, inevitably propose authorizing Government-sponsored, organized prayer. It is this aspect of the amendment that is troubling to many Americans because it raises the specter that Government-sponsored religious activities for groups inevitably

threaten deeply held and personal views of the individual. This threat is particularly dangerous when the individuals are school children aged 12, 10, or even younger.

The sponsors of this amendment argue that the wording of the provision prohibits the Government from coercing any child to pray. But how is an eight year old to respond when the teacher conducts an "an organized religious activity" each morning in which other children are involved?

What if the great majority of the class uses written prayer cards prepared by a particular denomination? What if the teacher discusses the types of prayer students may wish to give without "encouraging" a particular form of prayer? What if the school officials provide that students who do not wish to be a part of the morning devotional event must leave the room? All these types of conduct are apparently allowed by this amendment, but it is ludicrous to argue that these situations are "neutral" in regard to religion.

Such Government-sponsored activity in a public school classroom inevitably promotes religion. Moreover, in most cases it will promote a particular type of religion—the religious practices of the teacher and the majority in the community. It is impossible to believe that a child whose religious faith differs from majority of his classmates will not frequently feel embarrassed, coerced or ostracized when these Government sponsored religious activities occur.

THE WALLACE V. JAFFREE OPINION

Some supporters of his amendment argue that it is necessary because of the Supreme Court's recent decision invalidating an Alabama schools prayer decision. In fact, that opinion demonstrates the precise opposite conclusion—that voluntary prayer in public schools is permissible under the constitution and that no amendment is warranted.

In *Wallace* v. *Jaffree*,[1] the Supreme Court reviewed an Alabama statute that purported to authorized public school teachers to provide for a moment of meditation or voluntary prayer in their classrooms each morning. The Supreme Court found this statute was unconstitutional, not because voluntary prayer or a moment of silence is unconstitutional, but because the express and sole purposes of the statute was to promote religious prayer. The Supreme Court simply restated long-standing constitutional doctrine: The Government cannot take actions with the express purpose of promoting religious.

The Court determined that promoting religious prayer was the purpose of the legislature in large part from the statement made by Alabama legislators at the time bill was enacted. The sponsor of the bill, for example, inserted a statement into the record stating that the legislation was an "effort to return voluntary prayer" to

[1] 83-812 (June 4, 1985).

the public schools. The record of the case shows that the sponsor of the bill stated in response to questioning that he had no purpose in mind other than returning voluntary prayer to the public schools.

In striking down this statute, the court made a clear distinction between promoting religious prayer and allowing students and opportunity to pray or meditate silently:

> The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the day. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation. (Slip Op at 20.)

In other words, nothing prevents a young person from using an organized period of silence to pray. It goes without saying that nothing prevents this young person from praying at any other time during the school day.

Justice O'Connor who concurred in the opinion stated.

> Nothing in the United States Constitution has interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the school day. (Id. at 32.)
>
> Even if a statute specifies that a student may choose to pray silently during a quiet moment, the state has not thereby encouraged prayer over other specified alternatives: *Nonetheless, it is also possible that a moment of silence statute, either as drafted or as actually implemented, could effectively favor the child who prays over the child who does not. For example, the message of endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray.* (Id. at 38–39) (emphasis added)

Finally, Justice O'Connor wrote:

> The Court does not hold that the establishment clause is so hostile to religion that it precludes the States from affording schoolchildren an opportunity for voluntary silent prayer. To the contrary, the moment of silence statute of many States should satisfy the establishment clause standard we have here applied. The Court holds only that Alabama has intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer. This line may be a fine one, but our precedents and the principles of religious liberty require that we draw it. (Id. at 53–54)

This amendment goes far behind this "fine line" that separates neutrality from excessive Government involvement with religion. The statements in the report and the discretion left to local school officials show that this amendment would inevitably lead to the widespread institution or organized religious exercises in school. That is no doubt the precise intention of many supporters of this amendment but it clearly violates this country's constitutional tradition.

HOWARD M. METZENBAUM.

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